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No. 87-1656

In the Supreme Court of the United States

October Term, 1987

CONSOLIDATED ALUMINUM CORPORATION,
Petitioner,

v.

C. F. BEAN CORPORATION, BEAN DREDGING CORPORATION, AMERICAN EMPLOYERS INSURANCE COMPANY, OCEAN MARINE INDEMNITY COMPANY, LTD., ST. PAUL FIRE AND MARINE INSURANCE COMPANY, HIGHLAND INSURANCE COMPANY and ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

In admiralty, is a negligent tortfeasor liable for harm which its conduct was a substantial factor in causing where the risk of general harm to a class of which plaintiff was a member was foreseeable but the tortfeasor could not have foreseen the extent of the harm or the manner of its occurrence?

STATEMENT UNDER RULE 28.1

Petitioner Consolidated Aluminum Corporation is a wholly-owned subsidiary of Alusuisse of America, Inc. Alusuisse of America is wholly-owned by Swiss Aluminium, Ltd. and Lonza, Ltd.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 833 F.2d 65 and is reprinted in the appendix ("App.") at App. A. The opinion of the United States District Court for the Western District of Louisiana is reported at 639 F. Supp. 1173 and is reprinted at App. B. A prior opinion of the court of appeals reversing summary judgment against Petitioner is reported at 772 F.2d 1217 and is reprinted at App. C. The opinion of the district court granting summary judgment is unreported and is reprinted at App. D.

JURISDICTION

The court of appeals entered judgment on December 3, 1987 (App. E) and denied a timely petition for rehearing on January 5, 1988. (App. F) Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In this admiralty action,[1] petitioner Consolidated Aluminum Corporation ("Consolidated") sought damages from respondents C.F. Bean Corporation and Bean Dredging Corporation (collectively "Bean") caused by Bean's negligent rupturing of a high-pressure natural gas pipeline while performing maintenance dredging of a navigable river.[2]

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[1]Petitioner invoked the district court's jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740. Petitioner also invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332, but principles of admiralty law control even where jurisdiction of a maritime tort case is based upon diversity. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

[2]The remaining respondents are Bean's insurance carriers, who were joined as parties pursuant to Louisiana's direct action statute.

Consolidated owned an aluminum reduction plant near Lake Charles, Louisiana. The plant's sole source of energy was natural gas, which it obtained from a pipeline running under the Calcasieu River. (772 F.2d at 1219, App. C 3-5)

On April 5, 1980, Bean was dredging the river pursuant to a contract with the Army Corps of Engineers. The contract had alerted Bean to the presence and location of 14 gas pipelines within the scope of its dredging contract, including the pipeline which Bean negligently ruptured. This pipeline also was marked with two warning signs in the river. (639 F. Supp. at 1176-78, App. B 4-5, 9; PX-2 at 1-7) Bean struck and ruptured the pipeline while dredging. Within minutes, the rupture deprived Consolidated's plant, located six miles from the rupture site, of the gas volume and pressure required to prevent a "freeze-up" of molten aluminum, causing extensive physical damage to Consolidated's plant. (772 F.2d at 1219, App. C 5; 639 F. Supp at 1178-79, App. B 10-11; Trial Transcript ("Tr.") 735-48, 1098-99)

Bean conceded that its conduct was negligent. (Tr. 524) At the time of its negligence, Bean did not have specific knowledge of the existence of Consolidated's plant or that Consolidated's plant was connected to the pipeline. (639 F. Supp. at 1182, App. B 20) However, at the time of its negligence, Bean knew that many industrial plants were located in the Lake Charles vicinity and that the pipeline might service one or more of these plants, many of which were clearly visible from the rupture site. (PX-47 at 5-6, 111-12; Tr. 605-07; PX-20, PX-22, PX-23)[3]

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[3]In fact, at least 16 major industrial facilities, including Consolidated's aluminum manufacturing plant, were located within a seven-

(Continued on next page)

After a bench trial in the Western District of Louisiana, the district court held that because Bean did not know of Consolidated's connection to the pipeline, Consolidated's damage was an unforseeable consequence of Bean's negligence. Therefore, the district court entered judgment in favor of Bean on Consolidated's claim. (639 F. Supp. at 1183, App. B 21)[4]

The Fifth Circuit affirmed. The court reasoned that Bean should not be held liable to Consolidated, because a reasonably thoughtful person would not have foreseen that Consolidated would have suffered the precise harm in question as a result of Bean's negligent conduct, even

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(Continued)

mile radius of the Calcasieu River at the point of the rupture. (Tr. 599-604; PX-48) By 1980, the Lake Charles area had a reputation for 20 or more years as an industrial area and it was known as one of the foremost petrochemical and refining centers in the Gulf Coast area. (Tr. 263, 604-05) It was also widely known in 1980 that natural gas was being used as a primary source of fuel not only in all the plants in and around the Lake Charles area but throughout the whole Gulf Coast area. (Tr. 607-09) The natural gas was supplied to the plants in the Lake Charles area by a network of pipelines that ran throughout the area, including the 14 gas pipelines identified in Bean's contract as crossing under the Calcasieu River. (Tr. 609-10)

[4]The district court initially entered summary judgment in favor of Bean and against Consolidated, holding that under *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), Consolidated could not recover for what the district court characterized as Bean's negligent interference with Consolidated's gas supply contract. (App. D 6) The Fifth Circuit reversed, holding that the district court had mischaracterized Consolidated's cause of action and that because Consolidated had sustained physical harm to its plant as the result of Bean's negligence, the "bright line" rule of *Robins Dry Dock* did not preclude recovery. (772 F.2d at 1218; App. C 2) The Court of Appeals remanded the case to the district court with a direction that the trial court decide Consolidated's claim under traditional tort principles, including foreseeability and duty, as applied in admiralty. (*Id.* at 1224; App. C 16)

though it was foreseeable that Bean's negligence would result in harm to the pipeline. (833 F.2d at 68, App. A 7)

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision Conflicts With Decisions In Other Circuits And Is Contrary To Modern Concepts Of Tort Law, As Set Forth In The Restatement (Second) Of Torts.

The decision of the Fifth Circuit creates a conflict among the circuits and injects substantial analytical confusion into the law of admiralty regarding the scope of a tortfeasor's duty and the closely related question of liability for unforeseeable consequences.

As acknowledged by the Fifth Circuit, the existence of a duty depends upon whether "harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person . . . ." (833 F.2d at 68; App. A7) However, according to the Fifth Circuit, the inability of this "reasonably thoughtful person" to have anticipated the precise sequence of events flowing from the negligent act places that sequence of events and the resulting harm "beyond the pale of general harm" and therefore makes them unforeseeable and outside the scope of the actor's duty. (*Id.*)

In so holding, the Fifth Circuit confuses the concept of "foreseeability," as it relates to a reasonably thoughtful person's anticipation of the risk of some general harm required in order to impose a duty, with the related but different question of whether the particular method, manner and extent of harm is so highly extraordinary that a negligent actor should be relieved of liability even though the actor's conduct was a substantial factor in causing the

harm. The Fifth Circuit's handling of these historically and intellectually nettlesome questions creates a conflict among the circuits, is contrary to admiralty's policy of uniformity and its remedial nature, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970), and conflicts with the modern concept of legal cause, as set forth in the Restatement (Second) of Torts.

A. The Fifth Circuit's Decision Conflicts With Admiralty Decisions In The Second And Third Circuits.

This Court has long recognized the important policy of uniformity in the law of admiralty. *Moragne*, 398 U.S. at 402 (1970); *Workman v. New York City*, 179 U.S. 552, 558 (1900); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). *See generally* Currie, *Federalism and the Admiralty: The Devil's Own Mess*, 1960 Sup. Ct. Rev. 158 (1960). The Fifth Circuit's decision in this case evidences a retreat from that policy in a critical area of maritime law already beset by confusion.

The cornerstone of the Fifth Circuit's opinion is the inability of a reasonably thoughtful person to have foreseen the precise sequence of events and harm to Consolidated caused by Bean's negligence. (833 F.2d at 68, App. A 7) Therefore, under the holding of the Fifth Circuit, the foreseeability of the precise manner and extent of harm sustained by a plaintiff determines the tortfeasor's duty and its parameters.

Such a holding is in direct conflict with the Second Circuit's landmark admiralty decision in *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965), and the admiralty decision of the Third Circuit in *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978). The Second Circuit held in *Kinsman*

that liability exists for unforeseeable consequences directly resulting from a tortfeasor's negligence so long as the harm resulting therefrom, "although other and greater than expectable, is of the same general sort that was risked." 338 F.2d at 724. Likewise, the Third Circuit in *Pastore*, approaching the issue from the perspective of proximate cause, also concluded that liability exists even when the precise manner of the occurrence of the harm was not foreseeable as long as it can be said that the conditions encountered were not "so unusual" as to require a finding of "no proximate cause as a matter of law." 571 F.2d at 782.

In *Kinsman*, a negligently moored ship had parted from its moorings and set in motion a remarkably complex chain of events eventually resulting in a damming of the Buffalo River and the collapse of both towers of a drawbridge.[5] The Second Circuit imposed liability for, among other things, the resulting flood damage, even after acknowledging that the precise consequences of the various parties' negligence could not have been fairly foreseen. 338 F.2d at 726.

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[5]About three miles upstream from the drawbridge, the Shiras, owned by Kinsman, was negligently moored at a dock when her stern lines parted and she drifted into the current. Traveling down the S-shaped river, she struck the bow of the Tewksbury causing the latter's mooring lines to part and the Tewksbury followed the Shiras stern first down the river. A call was placed to the drawbridge crew and, although just a little more than two minutes was needed to elevate the bridge, it was just being raised some 30 minutes later when the Tewksbury crashed into its center, causing the south tower of the bridge to fall. The Shiras then became wedged against the Tewksbury, substantially damming the flow and causing water and ice to back up and flood installations on the bank with consequent damage as far as nearly three miles upstream. Subsequently, the north tower of the bridge collapsed, damaging adjacent property. *Kinsman*, 338 F.2d at 712-13.

> [W]e would find it difficult to understand why one who had failed to use the care required to protect others in light of the expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell short of what the law demanded.
>
> Foreseeability of danger is necessary to render conduct negligent; where as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken . . . the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation.

Id. at 723-724. (citations omitted) (footnote omitted).

Athough employing a different analytical framework, the conclusion of the Third Circuit in *Pastore*—that unforeseeability of the precise manner of the harm's occurrence will not prevent liability from attaching—is consistent with the holding in *Kinsman*, but contrary to the Fifth Circuit's position in this case. In *Pastore*, a longshoreman, who had been unloading cargo from a ship, discarded a cigarette butt in the ship's hold, resulting in a fire. A city fireman fell off a ladder that had been lowered into the hold and injured himself. The stevedore, who had employed the longshoreman, successfully argued in the district court that the fire was not the proximate cause of the injury since the vessel's crew had negligently failed to warn the fireman that the ladder was resting not on what appeared to be the deck, but rather on an unstable pile of frozen meat. In the district court's view those were "unusual and unforeseen circumstances" relieving the stevedore from liability. 571 F.2d at 782.

In reversing, the Third Circuit agreed that "[t]he precise way in which the plaintiff fell was, perhaps, not clearly foreseeable." *Id.* Nonetheless, the court concluded the circumstances were not "so unusual" as to find "no proximate causation as a matter of law." *Id.*

The resulting harm was a more remote consequence of the negligent conduct in *Kinsman* and *Pastore* than it was in this case. Certainly, a reasonable dredger could foresee the risk of some general harm to those serviced by the high pressure natural gas pipelines in the area from a disruption of the supply of natural gas resulting from the rupture of one of those pipelines even though a reasonably thoughtful person might not foresee the precise customer which would suffer the harm or the precise nature of that harm or the manner by which it would occur. Nevertheless, the Fifth Circuit refused to impose liability for precisely the same rationale which the Second Circuit had rejected in *Kinsman* as "difficult to understand." *Kinsman,* 338 F.2d at 723.

Therefore, the decision of the Fifth Circuit is in conflict with both the Second Circuit and the Third Circuit on the issue of what must be foreseeable—a risk of some general harm versus the specific consequences—in order to impose liability in admiralty.[6]

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[6]The Fifth Circuit's decision in this case also is contrary to traditional concepts of tort law, pursuant to which a risk of some general harm is all that must be foreseeable and not the specific consequences resulting from the negligent conduct. *See* J. Dooley, 1 MODERN TORT LAW, § 3.10 at 30 (1982); F. Harper, F. James, Jr. & O. Gray, 3 THE LAW OF TORTS, § 18.2 at 669-670 (2d ed. 1986); Harper, *The Foreseeability Factor in the Law of Torts,* 7 NOTRE DAME LAW. 468, 470 (1932).

B. Analytical Confusion Regarding Duty, Foreseeability And Legal Or Proximate Cause.

As the Second Circuit in *Kinsman* correctly acknowledged:

> [t]he weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct," and the damage, although other and greater than expectable, is of the same general sort that was risked.

338 F.2d at 724.

Nevertheless, Judge Friendly's opinion for the court in *Kinsman* observed:

> [t]his does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.

Id. at 725.

In grappling with this policy issue the Second Circuit conceded that, although "agreement in result" might be achieved in a particular factual situation, such agreement "might not be paralleled by similar unanimity in reasoning." *Id.*

This "agreement in result" but lack of "unanimity in reasoning," emanating from the seminal case of *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), and its multi-faceted progeny, is discussed in depth

in *Kinsman*, 338 F.2d at 721-26,[7] and is reflected in the *Kinsman* and *Pastore* decisions. The existence of such confusion is contrary to the strong admiralty traditions of simplicity and practicality, *Kermarec*, 358 U.S. at 631, and results in a breakdown of admiralty's tradition of uniformity. *Moragne*, 398 U.S. at 402 (citing *The Lottawanna, supra*).

Recognizing the analytical confusion in the areas of duty, foreseeability and causation, the American Law Institute attempted to clarify the law and adopt modern concepts to be used in analyzing these problems in its influential Restatement (Second) of Torts. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 435, Reporter's Notes at 150-51 (1966). Under the Restatement (Second) of Torts analysis, once the requirement of a risk of general harm to the plaintiff or a class of which plaintiff is a member is established (in other words, the establishment of a duty) and the actor's conduct is both negligent and a substantial factor in bringing about that harm, the unforeseeability of the extent of the harm or the manner in which it occurred will not prevent liability from attaching. RESTATEMENT (SECOND) OF TORTS, § 435(1) (1965).

As is readily apparent, Section 435(1) of the Restatement parallels the language of *Kinsman*. *Compare* RESTATEMENT (SECOND) OF TORTS § 435(1) with *Kinsman*, 338 F.2d at 724, 726. *Kinsman* recognized that "a point will be reached when courts will agree that the link has become too tenuous." *Id.* at 725. The Restatement in Section 435(2) attempts to bring clarity to this issue by making the

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[7] *See generally* F. Harper, F. James, Jr. & O. Gray, 3 THE LAW OF TORTS, § 18.1 at 650, § 18.2 (2d ed. 1986); C. Morris & C. Morris, Jr., MORRIS ON TORTS at 161-67 (2d ed. 1980); W. Prosser & W. Keeton, TORTS § 43 at 284-90 (5th ed. 1984); L. Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 755 (1950).

question of responsibility for such unforeseeable consequences an issue for the court under a determination of legal cause. Under the Restatement, as discussed in the next section, the court employs a *hindsight* test of foreseeability pursuant to which the events have to be "highly extraordinary" in order for the actor's conduct *not* to be deemed the legal cause of the harm. RESTATEMENT (SECOND) OF TORTS, § 435(2) (1965).[8]

The legal cause analysis of the Restatement was adopted into the law of admiralty in the Fifth Circuit in *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975).[9] In *Spinks*, the Fifth Circuit, speaking through Judge Wisdom, pertinently observed, "[t]he concept of proximate cause often obscures the true analysis of a tort. A court makes a policy judgment on the limits of liability when causation in fact has been established." 507 F.2d at 222. As noted by *Spinks*, "[i]t would be anamalous to allow an overly strict interpretation of proximate cause to defeat the remedial purposes of admiralty tort law." *Id.* at 223. Typifying the analytical confusion which exists in this area, the Fifth Circuit in this case failed to employ the Restatement's legal cause analysis. Indeed, the court did not discuss or even cite *Spinks* or the Restatement.

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[8]In *Pastore*, the Third Circuit confirmed its holding of liability by reference to the hindsight standard of legal cause reflected in the Restatement (Second) of Torts, § 435(2). *Pastore*, 571 F.2d at 783.

[9]The federal courts frequently refer to the Restatement (Second) of Torts in admiralty cases. *See, e.g., Avery v. United States*, 829 F.2d 817, 819 (9th Cir. 1987); *Cruickshank & Co., Ltd. v. Sorros*, 765 F.2d 20, 25 (2d Cir. 1985); *Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985); *Patentas v. United States*, 687 F.2d 707, 713-17 (3d Cir. 1982); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1135 (9th Cir. 1977); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 636-637 (8th Cir. 1972).

The lack of "unanimity of reasoning" reflected both among and within the circuits as respects the maritime tort concepts of duty, foreseeability and causation should not exist in an area of such traditions and important concern as admiralty. This Court, as discussed later in this Petition, has not directly addressed these issues. Accordingly, this case provides the appropriate vehicle for this Court to clarify the proper analysis of the issues of duty, foreseeability and legal cause in admiralty.

C. Modern Concept Of Legal Cause, As Set Forth In The Restatement (Second) Of Torts.

As noted in *Spinks*, "[b]ecause of strong policy considerations in admiralty, legal cause analysis [under the Restatement (Second) of Torts] is particularly suited to maritime tort law." 507 F.2d at 223.

Under the analysis promulgated in the Restatement (Second) of Torts, the concept of legal cause is used to determine the circumstances under which a defendant who has engaged in negligent conduct towards the plaintiff or a class of which plaintiff is a member will be held liable for the harm resulting from such conduct. *See* RESTATEMENT (SECOND) OF TORTS § 9 (1965). In order for such negligent conduct to be a legal cause of the harm, the conduct must be a substantial factor in causing the harm, *id.* § 431(a), and there must be "no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." *Id.* § 431(b).

On this record, there can be no dispute that Bean's concededly negligent conduct was, under the standards of the Restatement, *id.* § 433, a substantial factor in causing the harm to Consolidated. (772 F.2d at 1222, App. C 12)

Rather, the issue in this case, which the Fifth Circuit confused with other concepts,[10] is whether Bean's inability, at the time of its negligence, to foresee the specific manner and extent of the harm to Consolidated, a member of the class served by the high pressure natural gas pipeline, gives rise to a rule of law relieving it "from liability because of the manner in which [its] negligence has resulted in the harm." *Id.* § 431(b).

The Restatement (Second) of Torts provides the answer to that question in § 435:

> Foreseeability of Harm or Manner of Its Occurrence
>
> (1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.
>
> (2) The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.

The Fifth Circuit's opinion in this case is irreconcilable with the modern concept of legal cause under the

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[10]The Fifth Circuit's opinion in this case also speaks of "the anticipation of harm of a *general sort* to persons of a *general class*," and in so doing appears on the verge of properly articulating the standard for initially determining the existence of a duty on the part of the defendant. (833 F.2d at 67-68; App. A 4-7) (citing F. Harper, *The Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME LAW. 468, 482 (1932) (emphasis in original)). *See also* note 6, above. However, the rest of the Fifth Circuit opinion evidences general confusion over foreseeability as it relates to the concepts of duty and legal cause. The way in which the Fifth Circuit resolves these issues clearly is at odds with the Second Circuit, the Third Circuit and the Restatement.

Restatement. First, the Fifth Circuit treated the issue of whether a reasonably thoughtful person could have foreseen the extent of the harm or manner in which it occurred as being relevant to the concept of duty, rather than to the analysis of legal cause. Second, and more important, in fashioning its requirement, unprecedented in admiralty, of such specific foreseeability, the Fifth Circuit reached a result in conflict with *Kinsman* and *Pastore* and inconsistent with Restatement (Second) of Torts § 435(1), pursuant to which the unforeseeability of specific consequences does not preclude negligent conduct from being the legal cause of the harm.

Finally, by determining whether the particular consequences were foreseeable by a reasonably thoughtful person at the time of Bean's negligence, the Fifth Circuit adopted a prospective approach to the determination of foreseeability rather than the approach of Section 435(2) of the Restatement, under which a tortfeasor's conduct is a legal cause of the harm notwithstanding "the manner in which [the] negligence has resulted in the harm," *id.* § 431(b), except where, by *hindsight*, "it appears to the court highly extraordinary that it should have brought about the harm." *Id.* § 435(2). In adopting the hindsight approach to legal cause under § 435(2), the Restatement makes it clear that it is the court, as a matter of policy, which determines whether there is anything so highly unusual in the extent of the harm or the manner of its occurrence so as to release the tortfeasor from liability.

Because of the remedial policies of maritime tort law and this Court's important role in fostering these policies, this Court should grant certiorari to resolve the conflict in the circuits and to establish both an "agreement in result"

and "unanimity in reasoning" as respects the concepts of duty, foreseeability and causation in admiralty.

II. This Court Has Never Addressed The Proper Standard For Legal Cause In A Maritime Tort Action.

This Court has recognized the "substantial law-creating function" of the federal judiciary as a whole, and this Court in particular, in the formulation of admiralty law. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963). This Court has also noted admiralty's remedial and uniform nature. *Moragne v. States Marine Lines*, 398 U.S. 375, 387 (1970). The Fifth Circuit opinion furthers neither of these well-settled objectives of the law of admiralty. Instead, with its overly-restrictive approach toward liability, the Fifth Circuit opinion undermines and evidences a retreat from the traditionally broad remedial purpose of admiralty law, in a manner which creates conflict among the circuits.[11]

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[11]The concern expressed by this Court in *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), a product liability case, that the concept of foreseeability might be "an inadequate brake" on liability, 476 U.S. at 874, does not exist with respect to the elements of a cause of action for negligence under the Restatement. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965). Unlike a strict liability claim where a duty is owed to the public generally, a maritime tort analyzed under the Restatement requires the establishment of a legally protected interest. RESTATEMENT (SECOND) OF TORTS § 281(a) (1965). The requirement of a legally protected interest serves as a pragmatic limitation on a tortfeasor's liability by excluding liability for unintentional invasions which result solely in economic loss. *See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 772 F.2d 1217, 1222-24 (5th Cir. 1985); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51-54 (1st Cir. 1985); *Louisiana ex rel Guste v. M/V Testbank*, 752 F.2d 1019, 1021-25 (5th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 3271 (1986). "While the number of plaintiffs suffering only economic harm from a negligent

(Continued on next page)

This Court has never before expressly decided the standards for legal cause in an admiralty tort action. Given the importance of uniformity in the law of admiralty and the important role of this Court in determining the principles to be applied in such cases, we respectfully suggest that this case would be appropriate for review by this Court in order to decide the proper role of foreseeability in the determination of the concepts of duty and legal cause in negligence actions cognizable in admiralty.

(Continued)

act is indeterminate and perhaps infinite, the number of potential plaintiffs suffering physical harm is generally neither as indeterminate nor as possibly infinite." *Consolidated*, 772 F.2d at 1223.

CONCLUSION

For the above reasons, Consolidated respectfully requests this Court to grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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April 4, 1988

APPENDIX A

CONSOLIDATED ALUMINUM CORP.,
Plaintiff-Appellant,
v.
C.F. BEAN CORP., et al.,
Defendants-Appellees.
No. 86-4657.

United States Court of Appeals,

FIFTH CIRCUIT.

Dec. 3, 1987.

Appeal from the United States District Court for the Western District of Louisiana.

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

This case returns after remand, 772 F.2d 1217 (5th Cir. 1985), with Consolidated Aluminum Corporation appealing a benchtrial judgment rejecting its claims against C.F. Bean Corporation and Bean Dredging Corporation (collectively Bean), 639 F. Supp. 1173 (W.D.La. 1986). Consolidated seeks recovery for physical damage to its aluminum manufacturing facilities and for attendant economic loss caused by the interruption of its supply of natural gas. Its gas supply was suddenly terminated when a Bean dredge negligently ruptured a Texaco pipeline, causing Texaco to close the nearest valves to stem the flow of escaping gas. In the first appeal Consolidated sought and secured reversal of a summary judgment in favor of Bean.

The district court initially concluded that the rule of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), as expanded by this court in *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), *cert. denied, sub nom. White v. M/V TESTBANK*, U.S. , 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986), mandated a summary dismissal. We concluded that the "bright line" rule of *Robins Dry Dock* and *TESTBANK* "does not reach the instant case and that a plaintiff's claim of negligence for physical damages to equipment in which the plaintiff has a proprietary interest should be analyzed under tort principles applied by this Court in admiralty." 772 F.2d at 1218.

Background

The facts are set forth in detail in our prior decision and in the opinion on remand. We note only the most salient. On April 5, 1980, around 7:00 A.M., Bean was dredging the Calcasieu River Ship Channel near Lake Charles, Louisiana, pursuant to a contract with the United States Corps of Engineers. The contract warned Bean of the location of Texaco's twelve-inch, high-pressure, natural gas pipeline, which traversed the channel to service a nearby PPG Industries, Inc. plant. Bean had submitted a plan for dredging in the vicinity of structures and utilities crossing or adjacent to the channel. The plan comported with industry safety practices but the dredging crew failed to follow its procedures. As a result of the crew's negligent lapse, the dredge's cutterhead struck and ruptured the Texaco pipeline, allowing the escape of a large amount of gas.

The rupture caused an immediate drop in the pressure in the pipeline. To stem the flow, Texaco closed the nearest upline block valves. Unfortunately for Consolidated,

whose aluminum reduction plant was located approximately six miles from the rupture site, the closing of the valves cut off its supply of natural gas. The sudden termination of natural gas flow, Consolidated's only energy source for its electrical generators, caused substantial physical damage to Consolidated's plant and work-in-progress, plus an estimated equal amount of economic loss.

Consolidated's aluminum reduction plant is the smallest in the United States. It has the unique distinction of having only one energy source for the generation of the electricity used in its operation. The record reflects that aluminum reduction plants follow the universal practice of having a readily-available, alternate energy source. This practice avoids the risk of the very damages that Consolidated sustained as a result of the unprogrammed shut down. When the plant near Lake Charles, Louisiana was built, a calculated judgment was made—no alternate energy source, such as fuel oil, was provided, despite the fact that the generators installed could operate on either natural gas or fuel oil.

Consolidated filed suit against Bean and Texaco, and their insurers, and the Corps of Engineers, alleging tort and contract claims, and invoking admiralty and diversity jurisdiction. Consolidated's claims against Bean were first dismissed, as noted, on the motion for summary judgment. We remanded for reconsideration by the trial court and application of traditional tort principles, including "foreseeability and the related concept of legal duty." 772 F.2d at 1224.

After trial, the district court awarded Texaco judgment against Bean for damage to its pipeline and for the value of the gas lost. Consolidated's demands against Bean

were rejected on findings and conclusions that its damages were unforeseeable and, consequently, were not within the protected ambit of the duty imposed on Bean to dredge in a non-negligent manner. Consolidated appeals. We affirm.

Analysis

The analysis of a maritime tort is guided by general principles of negligence law. *Casaceli v. Martech Int'l., Inc.*, 774 F.2d 1322 (5th Cir. 1985); *Daigle v. Point Landing, Inc.*, 616 F.2d 825 (5th Cir. 1980). Under those principles a tortfeasor is accountable only to those to whom a duty is owed. *Watz v. Zapata Offshore Co.*, 431 F.2d 100 (5th Cir. 1970); 57 Am.Jur.2d *Negligence* § 33 (1971).

Determination of the tortfeasor's duty, and its parameters, is a function of the court. Green, *Proximate Cause in Texas Negligence Law*, 28 Tex.L.Rev. 775 (1950). That determination involves a number of factors, including most notably the foreseeability of the harm suffered by the complaining party. *Prosser and Keeton on Torts, Duty* § 53 (5th ed. 1984); Green, *The Duty Problem in Negligence Cases*, 28 Col.L.Rev. 1014 (1928); 29 Col.L.Rev. 255 (1929). The foreseeability factor persuaded the trial court. We also find that factor decisive. The critical inquiry is the foreseeability of the injury to Consolidated resulting from Bean's negligent dredging operation. The answer to that question largely defines the duty, if any, owned by Bean to Consolidated.

"Duty . . . is measured by the scope of the risk that negligent conduct foreseeably entails." Harper & James, *The Law of Torts, Scope of Duty in Negligence Cases* § 18.2 at 655 (2d ed. 1986). The duty "may be owed only with respect to the interest that is foreseeably jeopardized by the negligent conduct, and not to other interests even of the

same plaintiff which may in fact happen to be injured." Id. at 660 (interpreting dicta in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928)). For, as the eminent commentator and scholar Wex S. Malone observed in his Ruminations on Cause-in-Fact, collected in his *Essays on Torts*, p. 172 (1985), first published 9 Stan.L.Rev. 60 (1956):

> All rules of conduct, irrespective of whether they are the product of a legislature or are a part of the fabric of the court-made law of negligence, exist for purposes. They are designed to protect *some* persons under *some* circumstances against *some* risks. Seldom does a rule protect every victim against every risk that may befall him, merely because it is shown that the violation of the rule played a part in producing the injury. The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises (emphasis in original).

Foreseeability obviously marks the limits placed on a defendant's duty; the precise meaning of the concept is vital. As negligence law developed in England the concept became "whether any ordinarily prudent man would have foreseen that damage would probably result from his act." F. James & R. Perry, *Legal Cause*, 60 Yale L.J. 761, 786 (1951) (*quoting* 8 W. Holdsworth, *A History of English Law* 450 (2d ed. 1937)). Modern courts have given the concept varying meanings.[1] One scholar assigned an

[1]For example, *see, Words and Phrases, Foreseeability* (1953) ("reasonable anticipation that harm or injury is a likely result of acts or omissions." *Emery v. Thompson*, 148 S.W.2d 479, 480, 347 Mo. 494 (1941)); *Words and Phrases, Foreseeability* (1987) ("that which is objectively reasonable to expect, not merely what might conceivably occur." *Augenstine v. Dico Co., Inc.*, 481 N.E.2d 1225, 1228, 90 Ill.Dec. 314,

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almost generic definition, "the anticipation of harm of a *general sort* to persons of a *general class.*" Harper, *The Foreseeability Factor in the Law of Torts,* 7 N.D.Law. 468, 482 (1932) (emphasis in original).

Foreseeability guided our decision in *Republic of France v. United States,* 290 F.2d 395 (5th Cir.1961) in which a fire in the ship's cargo of fertilizer grade ammonium nitrate was followed by an explosion. The explosion was unprecedented; there was no general knowledge of the explosive nature of nitrate when exposed to fire. Although the vessel owners were negligent in handling the fire, we exonerated them from liability for the injuries caused by the explosion, concluding that because of the unknown volatility of the cargo, the ship-owners reasonably could not have foreseen that explosion. We held that to be found liable a defendant must have "knowledge of a danger, not merely possible but probably . . ." 290 F.2d at 401 (*quoting Dalehite v. United States,* 346 U.S. 15, 42, 73 S.Ct. 956, 971, 97 L.Ed. 1427 (1953) (citations omitted)).

Other commentators muse that "foreseeability . . . includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would

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317, 135 Ill.App.3d 273 (1st Dist. 1985)); "whether the injury or an injury similar in general might reasonably have been anticipated as a natural and probably result of negligent act or acts." *Geo. D. Barnard Co. v. Lane,* 392 S.W.2d 769, 771 (Tex.Civ.App.1965); "consequence which is probable according to ordinary and usual experience." *Wyatt v. Motsenbocker,* 360 S.W.2d 543, 546 (Tex.Civ.App.1962); "one which prudent man would anticipate as likely to result from an act" *Firestone Tire & Rubber Co., Inc. v. Lippincott,* 383 So.2d 1181, 1182 (Fla. App.1980); "anticipation of a general category of harm which in ordinary experience might be expected to flow from a particular type of negligence." *Garrett v. United States,* 501 F. Supp. 337, 339 (D.C.Ga.1980).

take account of it in guiding practical conduct." Harper & James, *The Law of Torts, Scope of Duty in Negligence Cases* § 18.2 at 657-59 (2d ed. 1986).

We perceive a harm to be the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention.

Applying this definition, we are not persuaded that Bean could have anticipated that is failure to follow safe dredging practices would likely result in physical damage to the equipment and work-in-progress at Consolidated's aluminum reduction plant several miles away. The harm was not of a general sort expected to follow from the failure to dredge carefully in proximity to a gas pipeline. Injury to property and persons from the escaping gas, or from a fire which might have ensued, would be examples of consequences that would be foreseeable.[2] The damages sustained by Texaco obviously were foreseeable. But the damage arising from the loss of natural gas supply, in turn causing the shut down of electric turbines, in turn causing a loss of electric power vital to the aluminum reduction process, with the ultimate result being substantial damage to equipment and product-in-process, goes beyond the pale of general harm which reasonably might have been anticipated by negligent dredgers.

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[2]Of interest is the rejection of the claims of PPG Industries, Inc. for its loss incurred in purchasing replacement gas at a higher cost during the period of repair of the pipeline. The PPG plant was adjacent to the channel and was the entity being served by the lateral pipeline. The Louisiana Supreme Court concluded that this risk was outside of the duty imposed on Bean. *PPG Industries, Inc. v. Bean Dredging*, 447 So.2d 1058 (La.1984).

We find no error in any factual finding or legal conclusion inherent in the trial court's ruling that the damages suffered by Consolidated were not foreseeable and, as such, not within the reach of the duty imposed on Bean to perform its dredging operations in a non-negligent manner. The judgment of the district court is therefore AFFIRMED.

APPENDIX B

CONSOLIDATED ALUMINUM CORPORATION
v.
C.F. BEAN CORPORATION, et al.,
Civ. A. No. 81-0500.

United States District Court,

W.D. LOUISANA,
LAKE CHARLES DIVISION.

July 16, 1986.

OPINION

VERON, District Judge.

Plaintiff, Consolidated Aluminum Corporation (hereinafter referred to as Consolidated) filed suit seeking lost profits and damages allegedly sustained by its aluminum manufacturing plant located south of Lake Charles, Louisiana. The alleged damages occurred when the natural gas supply to the plant was shut off due to a dredging barge breaking the pipeline which supplied the natural gas. Named as defendants were: C.F. Bean Corporation and Bean Dredging Corporation (hereinafter collectively referred to as Bean), the owners/operators of the dredge; Bean's insurers; and Texaco, Inc. (hereinafter referred to as Texaco), the owners of the pipeline. Texaco subsequently filed a third-party claim against the United States through the United States Army Corps of Engineers (hereinafter referred to as Corps of Engineers), as the party with primary responsibility for the dredging operations, tendering

the Corps of Engineers to Consolidated as a direct defendant. Additionally Texaco has asserted a cross-claim against Bean for the cost of repairing its pipeline and the value of the natural gas lost due to the rupture of the pipeline by Bean. Texaco also seeks indemnification or contribution from Bean for any amount it might be required to pay to Consolidated. Texaco has filed a claim against the United States through the Corps of Engineers contending that the Corps of Engineers is liable for Bean's actions because it failed to properly supervise and control Bean's activities, and that the Corps of Engineers is independently liable because it failed to select a competent contractor to dredge the Calcasieu River Ship Channel. Bean has filed a cross-claim against Texaco, seeking indemnification or contribution in any amount for which it may be cast.

This Court acting upon Bean's motion for summary judgment originally granted that summary judgment as to Bean on the grounds that, under *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), no cause of action exists in tort for negligent interference with contract.[1] The United States Fifth Circuit Court of Appeals, 772 F.2d 1217, reversed the summary judgment and remanded, finding that "the bright line" rule of *Robins Dry Dock* did not apply in the instant case and stating that the plaintiff's claim of negligence should be analyzed under tort principles applied by this Court in admiralty.

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[1]Final judgment under Fed.R.Civ.P. 54 was entered and all further proceedings in the case were stayed pending outcome of appeal to the Fifth Circuit.

The issues of liability and quantum of damages have been bifurcated with the latter being reserved for resolution at a future date.

On remand, after hearing the testimony, reviewing the stipulations and pleadings, and weighing all of the evidence presented at trial on the merits, the Court makes the following:

FINDINGS OF FACT

1.

Consolidated is and was at all pertinent times a New York corporation doing business within this District. Bean (collectively) is and was at all pertinent times a Louisiana corporation. Texaco is and was at all pertinent times a Delaware corporation doing business within this District. The United States is and was at all pertinent times a sovereign nation as to which venue properly lies within this District.

2.

In 1963, Texaco laid a natural gas pipeline in order to provide natural gas service to one customer, PPG Industries, Inc. This pipeline consisted of two segments: a six-inch line known as the "Big Lake Line" or the "Hackberry Line," running from the Hackberry area south of Lake Charles, Louisiana to a valve manifold known as "Point C"; and, a twelve-inch line known as the "PPG Lateral," running from Point C to the PPG plant located across the Calcasieu River.

The Corps of Engineers issued a permit (no. LMNOD (Calcasieu River) 287) to Texaco allowing Texaco to construct the twelve-inch pipeline across the Calcasieu River

at Mile 31.9 Station No. 1683 + 90. The permit set forth the guidelines to be followed in laying and maintaining the pipeline crossing. The permit additionally provided in Clause (g), as one of the conditions for issuance:

> That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized, which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes and no claim or right to compensation shall accrue from any such damage.

That pipeline was laid and maintained in accordance with the requirements of the Corps of Engineers permit.

4.

In 1965, Texaco connected an unused sixteen-inch production line, known as the "Evangeline Pipeline," to the PPG lateral. Natural gas was then transported through the Evangeline Pipeline.

5.

By contract dated September 20, 1968, a Gas Sales and Purchase Contract was executed between Texaco and Consolidated's predecessor in interest, Gulf Coast Aluminum Corporation. In accordance therewith, a pipeline was laid from Point C southward to Consolidated's plant, located south of Lake Charles. The gas contract provided that Consolidated would purchase its plant's requirements, up to a stated maximum, and in any case, not less than a specific quantity of gas, from Texaco.

6.

On December 14, 1979, Bean, who at all times held itself out to the public as an expert, independent dredging

contractor, entered into Construction Contract No. DACW 29-80-C-0063 with the United States Army Engineer District, New Orleans for maintenance dredging of the Calcasieu River and Pass from Mile 15.5 to Mile 36, along with other areas unimportant to this litigation. For the area surrounding Texaco's pipeline crossing, the contract specifications called for dredging to a minus forty feet MLG (mean low gulf) over a four hundred foot project width of the bottom with one foot allowable over-dredging and side slopes of one to three feet.

7.

General provision 12 of the contract provides in pertinent part:

> The Contractor shall, without additional expense to the Government, be responsible . . . for all damages to persons or property that occur as a result of his fault or negligence. He shall take the proper safety and health precautions to protect the work, the workers, the public and the property of others. . . .

8.

And, the technical provisions of the contract provides:

> 1-10.1 The Contractor shall exercise caution when working in the vicinity of structures and utilities crossing or adjacent to the channel or disposal areas. Repair of any damage resulting from excessive or improper excavation in the bottom or side slopes of the channel will be the responsibility of the Contractor. Where dredging to the theoretical section might endanger any structure, the Contracting Officer may reduce the required excavation in the vicinity of such structure.

1-10.2 The Contractor shall provide at least project dimensions over all utility crossings by whatever approved method the Contractor elects to use. The Contractor shall submit for approval by the Contracting Officer a detailed plan of operation at each pipeline or utility crossing where construction surveys indicated project channel does not exist. The plan shall contain emergency measures to be taken in the event of an accident. The Contractor shall notify the owners of pipelines or utilities at least 3 days prior to operating within 150 feet of a pipeline or utility.

1-10.3 The following structures or utilities are located within the limits of the work. The vertical clearances listed below were furnished by the utility owners at the time permits were issued and are not the result of a survey made by the Government. It will be the responsibility of the Contractor to verify these locations and clearances.

9.

The correct location of Texaco's pipeline was provided in the contract as well as Texaco's address.

10.

On January 14, 1980, Bean provided the Corps of Engineers with a general plan for safe dredging around and over utility crossings like Texaco's pipeline, which was approved by the Corps of Engineers. Among other things this plan provided that:

The owners of each pipeline and/or utility lines will be contacted at least seven (7) days before by phone and by letter to have a crew come out and mark and verify the elevations of respective lines and give all information to the Dredge Superintendent. . . . [Bean] will

request that a representative be on board the dredge to witness the depths and swing of the dredge.

This plan further provided that the dredge was to advance to within twenty-five feet of the pipeline and then tie off the cutter. This plan reflected the typical and customary practice in the dredging industry.

11.

Dredging began on January 14, 1980. On March 24, 1980, Bean added its Dredge No. 32 (the dredge involved in this matter) to the project. The dredge was 202 feet long, 49 feet in width, and contained a 56 foot cutter ladder, to which the cutter was attached. The dredge maintained a crew of approximately 45 men.

12.

Mr. Elton McCabe, a project manager for Bean, was in charge of and had overall supervision of Bean's dredges operating pursuant to the dredging contract, including Dredge No. 32.

13.

Captain Adloph Pontiff was the Dredge Superintendent of Dredge No. 32 during all pertinent times, and as such, Pontiff supervised and controlled the operation of Dredge No. 32, including all employees aboard the vessel. On board the dredge, he had total authority and discretion in running the dredging operations.

14.

Pontiff had only occupied the position of Dredge Superintendent for approximately three months prior to the accident. This was the second dredging project that

Pontiff worked on in the capacity of dredge superintendent, and the first of those projects that involved dredging in the vicinity of utility and pipeline crossings. However, Pontiff had worked on dredges for many years in various other capacities.

15.

Dredge No. 32 began work above the Texaco pipeline crossing and worked its way down river. The method of dredging employed by Dredge No. 32 was the "box" cut method whereby the dredge dredges beyond the channel limits, controlling the width of the cut by reading degrees of the dredge's swing, thus "feeling for the bank" of the channel.

16.

Though this method of dredging may or may not be a proper procedure in areas free of utility crossings, it is contrary to sound and generally accepted dredging practice in areas proximate to utility crossings such as the area around the Texaco pipeline.

17.

The sound and generally accepted dredging practice to be employed especially in areas where utility crossings are located is to stake or mark the channel so that the dredge will be able to maintain proper alignment on the centerline of the channel. Buoys, stakes or markers are required in order to mark the centerline and toes (edges) of the channel so that those persons operating the dredge will know how much of a swing to make.

18.

Bean, through its Dredge No. 32, failed to follow the standard dredging practice as described in Finding of Fact No. 17.

19.

Dredge No. 32 struck and ruptured the Texaco pipeline at approximately 7:00 A.M. on April 5, 1980. The point of rupture was located 34 feet east of the eastern toe of the channel.

20.

On the evening before the dredge reached the pipeline crossing, Pontiff left instructions with the leverman on watch to call him when the dredge was 50 feet before the pipeline. The leverman misunderstood Pontiff's instructions. He thought that Pontiff was to be called when the dredge spuds were within 50 feet of the line, at which point the cutterhead would have already crossed the line. Instructions were relayed by him to the other leverman to proceed over the Texaco pipeline. Consequently, Pontiff was not summoned before the cutterhead started across the line.

21.

The exact location of the pipeline was well delineated by fully visible and legible signs stating: WARNING/DO NOT ANCHOR OR DREDGE. Bean was also put on notice of the correct location of the pipeline by provisions contained in the dredging contract.

22.

Bean failed to notify Texaco that the pipeline was being dredged over by Dredge No. 32, as mandated by the

dredging contract and Bean's general plan, in order that a Texaco representative may be present during that procedure, although the evidence reveals that Bean in fact attempted to contact Texaco.

23.

Safe dredging practice requires that when a utilities owner is not present and the exact location of the crossing is unknown, dredging be suspended in the area of the crossing and that the dredge pass over the crossing, resuming dredging a safe distance beyond the crossing. Safe dredging practice, as well as the provisions of the general plan, also requires that a dredge tie on is cutterhead when it approaches within twenty-five feet of utility crossing.

24.

It is evident that Dredge No. 32 failed to undertake any of those safety practices recognized in Finding of Fact No. 23.

25.

The rupture in the natural gas pipeline allowed a mammoth amount of gas to be released from the line, sending mud, silt and water spraying fifty feet into the air.

26.

The rupture of the pipeline caused pressure in the pipeline to immediately drop. At 9:15 A.M. of the same day, Texaco was forced to shut off the gas flow at a block valve located on the Evangeline Line. The effect of closing this valve was to completely cut off the flow of natural gas to Consolidated's plant.

27.

The break in the pipeline was repaired by Texaco and a full gas supply was restored to Consolidated on April 15, 1980.

28.

Consolidated's plant consisted *inter alia* of the following facilities: (A) An electrically operated aluminum reduction pot line containing 71 operating smelting pots wherein alumina and bath materials are heated and melted in an electrolytic process by which molten aluminum is produced. Each pot utilizes 24 carbon anodes weighing in excess of a thousand pounds each which are suspended above the pots and project downward into the molten bath. The bottom of each pot consists of cathode blocks on which the aluminum is produced. (B) A gas fired coke calciner approximately 180 feet in length which is lined with refractory brick and refractory material. In this calciner green coke is subject to temperatures, which in portions of the calciner exceed 2,500 degrees Fahrenheit, and the green coke is thereby refined into calcined coke. (C) A power plant which utilizes natural gas to produce electric energy for plant operations. The power plan consists of three gas fired jet turbines, three steam boilers and two steam turbines, as well as associated electric generators.

29.

Because of the reduction in gas pressure and gas supply, Consolidated sustained physical damages to its equipment and work in process at the plant and attendant economic damages. These physical damages include: (A) Freezing (solidifying) of the liquid bath materials and liquid aluminum in the reduction pots; (B) Cracking and

air burning of anodes in the reduction pots; (C) Cracking of cathode blocks in the reduction pots; (D) Air burning of side wall blocks in the reduction pots; (E) Burning of breaker bars in the reduction pots; (F) Loss of useful life of the reduction pots; and (G) Loss and cracking of calciner refractory materials.

30.

Consolidated's Lake Charles plant had no back-up or secondary source of power whatsoever. It was unique in this respect. The testimony of Mr. John Fitzgerald, formerly of Kaiser Aluminum, and Mr. Dwight Keller, formerly with Reynolds Aluminum, made it clear that the Consolidated Lake Charles Plant, with no secondary source or back-up, was unique in the aluminum industry. No other aluminum reduction plant is fed with power from only one source. Consolidated's situation was unheard of in the aluminum industry. Energy is the critical element in the aluminum industry. It is such a critical factor that a constant and continuing source(s) of it must exist. Consolidated's arrangement for gas delivery from Texaco only, with no secondary source or back-up, was inadequate.

31.

Mr. William Boyer, Consolidated's executive in charge of the original planning and construction of the plant, explained the reasons behind this peculiar situation. Mr. Boyer, in order to get the plant built, had to obtain power at a cost of no more than 4.0 mills per kilowatt-hour. Mr. Boyer went to great lengths to explain the ultimate cost to Consolidated of even a 1 mill increase in power cost. But with the Texaco contract cost, including

the cost of the power plant to convert that gas into electricity, Mr. Boyer was able to arrange a power cost right at the 4.0 mills per kilowatt-hour budget. Consolidated would spend no more. Boyer did not even consider the cost of an oil storage tank for a back-up to fuel his turbines. That cost, estimated by Boyer to be $200,000, was prohibitive. Consolidated's gas turbines were designed to operate on liquid fuel oil as well as on natural gas, but Consolidated never made the necessary implementations. It was explained that the Lake Charles plant was at a considerable "disadvantage" because of its size. It was the smallest aluminum reduction plant in the United States. It did not have the production to "spread the cost" of other and suitable alternatives.

32.

Considering the actual delivery of Texaco's gas, even Mr. Boyer did not expect a "fail safe" system. Although he believed that Texaco's "vast distribution system" was a reliable one, Boyer did not evaluate any of the risks to his plant in the event of an interruption in Texaco's "vast" pipeline system.

33.

Mr. William Kinney was employed as a construction inspector by the Corps of Engineers and was the primary field representative of the Corps of Engineers on this particular project. One of Kinney's responsibilities was to monitor the work done by Bean to insure compliance with the dredging contract. Kinney's office was aboard one of Bean's dredges (not Dredge No. 32). Kinney visited each dredge on the project two or three times a week.

34.

Kinney was not aboard the Dredge No. 32 at the time of the allision with the pipeline. He noted on previous occasion that the Dredge No. 32 was not using stakes, buoys, or markers in dredging; however, the dredge at that time was not operating in the vacinity of a utility crossing, and Kinney had no reason at that time to believe that the dredge would not follow the prescribed methods for dredge over and around utility crossings.

35.

The Corps of Engineers' permit issued prior to the construction of the original pipeline from the Hackberry Area to PPG required that where the PPG Lateral (Texaco pipeline) passed beneath the proposed Calcasieu Ship Channel, it should lay at a depth fifty feet below Mean Low Gulf for that area where the pipeline would be beneath and coextensive with the deepest portion of the Ship Channel (four hundred feet). The measurements were based upon the theoretical location of the Ship Channel inasmuch as it had not yet been dredged with the PPG Lateral was laid. Once the Ship Channel began to slope upward, it was the requirement that the Texaco pipeline remain ten feet beneath the side slopes of the channel, the ten feet being measured along a line perpendicular to the side slopes. Surveys performed following the accident established that the Texaco pipeline was clearly marked and buried to its required depth or greater, particularly in the area of the break.

36.

Prior to April 5, 1980, there was no block valve in the Texaco pipeline system between the east bank of the Calcasieu River and the point at which the Evangeline Line tied

into the Texaco pipeline so as to enable Texaco to isolate the section of the pipeline which crossed the channel in the event of a rupture of the pipeline.

37.

As a result, in the instant situation, Texaco was forced to close a block valve on the Evangeline Line and a block valve at Point C in order to isolate the rupture occurring in the Calcasieu River. The result of this was that the natural gas supply to Consolidated's plant was cut off.

38.

There was conflicting expert testimony presented at trial by the parties regarding whether or not sound engineering practices dictated that Texaco should have had a block valve located on the east bank of the channel crossing so that it could have been closed instead of the valve located on the Evangeline Line. Had such a block valve existed, Consolidated would have continued to receive a flow of natural gas.

39.

Mr. Roger Craddock, testifying as Consolidated's expert witness, maintained that sound engineering practice required the placement of such a block valve on the east bank of the channel. However, Craddock admitted that no government regulation or industry standards code require such a placement of a valve.

40.

On the other extreme, Mr. Johnny Atwood, testifying as Texaco's expert witness, stated that all reasonable design precautions were taken by Texaco and all applicable

industry standards, government codes and sound engineering practices had been conformed with in designing and constructing the pipeline.

41.

Consolidated also points to the fact that Texaco, subsequent to the accident, installed a block valve on the east bank of the channel crossing and suggests that Texaco should have installed the valve prior to the allision. However, Mr. Atwood testified that the valve was added after the repairs to the pipeline were made as merely a precaution against the possibility that the ends of the pipeline might pull away from the clamps used to reconnect them.

42.

After careful reflection, this Court agrees with the expert opinion of Atwood and accepts his conclusions as to reasonableness of Texaco's design and construction of the pipeline system.

DISCUSSION OF LAW AND RULING

This Court has jurisdiction of this action as an admiralty and maritime claim, as well as under diversity of citizenship jurisdiction, and venue is proper in the Western District of Louisiana.

The issues presented for resolution by this Court are: whether the various parties owed any duties of care; to whom those duties were owned if any existed; whether any of these duties were breached; and what damage resulted as a consequence of those breaches, if any, occurred.

CONSOLIDATED'S CLAIM AGAINST BEAN

The Fifth Circuit, in denying a rehearing on its reversal of this Court's summary judgment, aptly characterized the situation presented to this Court on remand:

> Our discussion of the Robins Dry Dock/ TESTBANK line of cases showed that the 'pragmatic limitation upon the tort doctrine of foreseeability,' *State of Louisiana, ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, at 1023 (5th Cir. 1985), established by these cases, is inapplicable to the instant case because the plaintiff Consolidated unquestionably suffered physical harm to its own property. We further conclude the mere existence of a contract between Texaco (whose property suffered the most immediate harm from the defendant's dredging) and Consolidated does not create a legal bar to Consolidated's claim against Bean for negligent dredging. We in no way intimated that Consolidated could recover for 'negligent interference with contract.' Nor did we hold that summary judgment for the defendant would necessarily be improper on the facts of the instant case. Rather, we remanded because the district court expressly omitted to review the issue of foreseeability with regard to negligent dredging. We expressly declined to reach the question of 'whether Consolidated's claim of negligence would withstand scrutiny under a foreseeability test,' 772 F.2d at 1218 n. 2, and left the application of traditional tort principles, including foreseeability and the related concept of legal duty, for the trial court to determine on remand at 1224.
>
> *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 772 F.2d 1217 at 1224 (5th Cir.1985).

This Court must now consider the legal duty owed by Bean, the scope of that duty, to whom it was owed, and the

foreseeability of Consolidated's harm. Foreseeability is defined as "... the reasonable anticipation that harm or injury is a likely result of acts or omissions." Blacks Law Dictionary, 5th ed. The issues of whether Bean owes a duty to Consolidated, and whether the conduct of Bean in regard to Consolidated was negligent, turn on whether Bean could have reasonably anticipated the risk of physical harm (as well as economic) to Consolidated.

> [A] tort to the person or propety of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. [Robins Dry Dock], 275 U.S. [303] at 309, 48 S.Ct. [134] at 135.
>
> *Cargill, Inc. v. Doxford and Sunderland, Ltd.*, 782 F.2d 496 and 498 (5th Cir.1986).

In *PPG Industries, Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984), a case involving the same accident as that in the instant case, the Louisiana Supreme Court, when confronted with PPG's claim for indirect losses and additional fuel costs resulting from the rupture of Texaco's pipeline, held that the particular risk, that being the risk of shutting down the PPG plant, was not encompassed by Bean's duty not to negligently damage Texaco's pipeline. *Id.* 1059-1060.

The Louisiana Supreme Court, as was suggested to this Court by the Fifth Circuit in the instant matter, applied duty-risk analysis. Finding that PPG's losses were indirect, that Court stated that:

> [T]here is clearly an ease of association in the present case between the rule of law which imposes a duty not to negligently damage property belonging to

> another and the risk of injury sustained by [PPG] because of the damage to its property. As noted, however, a rule of law is seldom intended to protect *every* person against *every* risk. It is much more difficult to associate the same rule of law, in terms of the moral, social and economic values involved, with the risk of injury and the economic loss sustained by the person whose only interest in the pipeline damaged by the tortfeasor's negligence arose from a contract to purchse gas from the pipeline owner. It is highly unlikely that the moral, social and economic considerations underlying the imposition of a duty not to negligently injure property encompass the risk that a third party who has contracted with the owner of the injured property will thereby suffer an economic loss. *Id.* at 1061.

This Court recognizes that the *PPG* case involved what appeared to be only economic losses; however, this Court is of the firm opinion that the rationale, espoused by the Louisiana Supreme Court therein, applies as well to the instant matter relating to the physical damage suffered by Consolidated.

Here, the duty owned by Bean is the same as that found in the *PPG* case. Clearly, the evidence shows that Bean owed a duty to conduct its dredging operations in a reasonable manner so as to avoid causing physical damage to owners of pipelines located in the area of the dredging operations. Breach of that duty would create a recognizable harm to a pipeline owner such as Texaco.

In *Diamond State Tel. Co. v. Atlantic Refining Co.*, 205 F.2d 402 (3rd Cir.1953), a case involving an allision between a tanker and a telephone cable laying across a ship channel, the Third Circuit found that:

> Here we have the unforeseeable libellant, a maritime instance of the landlubber's unforeseeable plaintiff. The scope of the Yeager's duty is not to be determined by what we know now but by what those aboard her knew or should have known as they approached the flotilla. They knew that there were one or more vessels ahead of them and that any unseamanlike navigation on their part would subject those vessels to an unreasonable risk of harm. Thus, they had a duty to navigate so as not to create such risk, and they did. They could not possibly have foreseen that poor navigation would have subjected libellant's cable to an unreasonable risk of harm because they neither knew nor should have known that the cable was there. Thus, as to the cable, there was no duty and, consequently, could be no negligence. *Id.* at 407.

Though somewhat factually dissimilar to this case, the rationale expressed by the Court is applicable here.

In the instant matter, though Bean had knowledge of the pipeline crossing or at least should have had the knowledge, Bean could not have possibly foreseen that its improper dredging practices would have subjected Consolidated's plant, so remotely located, to an unreasonable risk of harm because Bean did not know, nor should it have known of Consolidated's connexity to the pipeline. Thus as to Consolidated's plant, there was no duty and therefore no negligence on the part of Bean.

Consolidated, however, is not a pipeline owner. Neither is Consolidated an owner of any property near the site of the rupture of Texaco's pipeline, unlike PPG whose plant was located proximate to the pipeline. Consolidated's damage occurred only because Texaco was unable

to deliver the natural gas as was contracted for by Consolidated and Texaco. Only after that natural gas supply was interrupted did the physical damage to Consolidated's facilities occur. Consolidated's plant was located more than six miles away from the point of rupture, on a different body of water, and "upstream" in Texaco's gas distribution system. It is clear that Bean had no knowledge of Consolidated's connexity to the Texaco pipelinne. There was nothing to even suggest that Bean reasonably anticipated or should have reasonably anticipated that a rupture of the Texaco pipeline would cause such physical damage to such a remotely located plant. Consolidated was so far outside the zone of any obvious danger from Bean's dredging that no reasonable person would have anticipated that Consolidated would suffer physical harm as a result of Bean's dredging. In comparison to the *PPG* case, the possibility, of physical harm involved here was much more remote and attenuated than the mere possibility of economic loss.

For the foregoing reasons, this Court finds that the physical damage sustained by Consolidated was an unforeseeable consequence of the rupture of Texaco's pipeline by Bean, and therefore, Bean is not liable.

However, we will also address the issue of whether Consoidated is entitled to punitive damages from Bean in the event the appellate court disagrees with our conclusion that Bean was not negligent in its conduct toward Consolidated and is not liable to Bean.

Under general maritime law, punitive damages may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. *Complaint of Merry Shipping, Inc.* 650 F.2d 622 at 625 (5th Cir.1981). In

the instant matter, this Court is unable to conclude that the conduct of Bean and/or its employees was willful and in gross disregard for the rights of Consolidated. Pontiff gave instructions that he was to be notified when the dredge approached within fifty feet of the pipeline crossing. These instructions may have been ambiguous and could have been misunderstood by the crew. As a result, the cutterhead had already started across the pipeline when Pontiff was notified. Though this conduct may have constituted negligence, it cannot be said that it was willful and in gross disregard of Consolidated's rights.

Additionally, the principle or master cannot be case for punitive damages for the willful or reckless act of an agent or employee unless the act was committed with the approval and knowledge of the principle. *McGuffie v. Transworld Drilling Co.*, 625 F.Supp. 369, 371 (5th Cir.1985). Even assuming that Pontiff and/or the crew of Dredge No. 32 acted willfully and with gross disregard for Consolidated's rights, Bean, as master or principal, would not be liable for punitive damages arising as a result of that conduct. Pontiff had total authority and discretion in running the dredging operations. Bean had provided a plan of dredging which met all requirements of established safety practice. It is readily apparent that Bean expected and depended upon Pontiff to carry out that plan. There is nothing in the record to indicate that Bean, as a routine and continuing practice, allowed, approved or had knowledge of dredging operations conducted in a contravention of submitted dredging plant and accepted dredging practices.

We now address the other various claims made in this case.

ALL CLAIMS AGAINST THE UNITED STATES[2]

The evidence presented at trial and herein previously outlined in this Court's findings of fact, clearly reveals that Bean acted as an independent contractor of the United States. Equally clear is the rule of law which provides that a contractee is generally not liable for the torts of an independent contractor. *Kirk v. United States*, 270 F.2d 110, at 116 (9th Cir.1959). Nor does the fact that the United States retains the right to inspect work under construction to see that the provisions of the contract are carried out, and also the right to stop work if they are not, provide sufficient basis to hold the United States liable for damage resulting from negligence of the contractors in the peformance of the contractor. *Id.* at 116-117. Additionally the issuance of regulations relating to safety does not render the United States liable for an independent contractor's negligence. *Market Insurance Company v. United States*, 415 F.2d 459, at 463 (5th Cir.1969).

Therefore, it is the conclusion of this Court that the United States is not liable for damages occasioned by the fault of Bean to any party to this suit.

It is to be additionally noted that Texaco cannot recover its own damages from the United States on an

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[2]Consolidated has cited for our consideration the case of *City of New Orleans, Etc. v. United States*, 501 F.Supp. 164 (E.D.La. 1980) as the only precedent for liability of the United States. However, this decision was subsequently reversed by the United States Fifth Circuit Court of Appeals in 1981 on other grounds in an unpublished opinion (665 F.2d 350) and the appeallate court did not address the issue of whether the United States, through the Corps of Engineers, could in fact be held liable for the torts of a dredging contractor. As such this Court does not feel compelled to follow the ruling of the District Court in *City of New Orleans*; but, instead chooseds to follow the established law of the United States as analyzed in the text of this opinion.

independent basis of liability in light of Clause (g) of the Corps of Engineers permit granting Texaco permission to lay its pipeline across the Calcasieu River which provides:

> That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized, which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes and no claim or fight to compensation shall accrue from any such damage.

The courts of this nation have upheld the validity of this clause which disclaims liability on the part of the United States for any damage or injury to a structure authorized by a Corps of Engineers permit. See *Boston Edison Co. v. Great Lakes Dredge and Dock Co.*, 423 F.2d 891 (1st Cir.1970); *Pacific Northwest Bell Tel. Co. v. United States*, 549 F.2d 1313 (9th Cir.1977), *cert. denied* 434 U.S. 820, 98 S.Ct. 62, 54 L.Ed.2d 76 (1977).

TEXACO'S CLAIM AGAINST BEAN

This Court now turns its attention to Texaco's cross-claim against Bean for the costs of repairing its pipeline and the value of the natural gas lost due to the breaking of the pipeline by Bean.

> 'It is well established that there is a presumption of fault against a moving vessel that strikes a statutory object, such as a dock or navigational aid.' *Freeport Sulphur Co. v. S/S HERMOSA*, 368 F.Supp. 952, 953 (E.D.La.1973); *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir.1967). 'In admiralty, this presumption does more that merely require the ship to go forward and produce some evidence on the presumptive matter. The moving vessel

must show that it was without fault or that the collision was occasioned by fault of the stationary object or was the result of inevitable accident.' *Patterson Terminals, Inc. v. S/S JOHNANNES FRANS*, 209 F.Supp. 705, 707 (E.D.Pa.1962), citing *Carr v. Hermosa Amusement Corp., Ltd.*, 137 F.2d 983, 985 (9th Cir.1943). We have held that '[t]he burden is heavily upon the vessel asserting [the inevitable accident] defense.' "Such vessels 'must exhaust every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required.'" *Brown & Root Marine Operators, Inc., supra*, 377 F.2d at 725. *Bunge Corp. v. M/V FURNESS BRIDGE*, 558 F.2d 790 at 793-794 (5th Cir.1977), *cert. denied* 435 U.S. 924, 98 S.Ct. 1488, 55 L.Ed.2d 518 (1978) (footnote omitted).

The presumption applies to an instance where the fixed object happens to be a submerged pipeline. *Marathon Pipeline Company v. Drilling Rig Rowan/Odessa*, 527 F.Supp. 824 (E.D.La.1981), *aff'd.* on other grounds, 699 F.2d 240 (5th Cir.1983), *cert. denied sub* nom. 464 U.S. 820, 104 S.Ct. 82, 78 L.Ed.2d 92 (1983), reversed on other matters, 761 F.2d 229 (5th Cir.1985). A pipeline owner is not guilty of any fault or neglect which contributed to damage sustained by the pipeline when it is struck by a vessel, where the pipeline is properly laid in accordance with required permits. *Id.* at 831.

In the instant case, it is undisputed that the Bean dredge struck Texaco's pipeline, and it is abundantly clear that Bean knew or should have known where the pipeline was located. The location of the pipeline was specifically stated in the dredging contract and the actual traversal of the channel by the pipeline was clearly marked by warning signs situated directly across the pipeline. Bean certainly

owed a duty to Texaco to exercise caution in dredging around the pipeline.

Bean attempted, at trial, to overcome the presumption of fault by asserting that Texaco's pipeline was not laid in accordance of the requirements of the Army Corps of Engineers permit, and that this was in fact the cause of the allision between the Bean dredge and the pipeline. However, the evidence, as reflected in the Findings of Fact, reveals that the pipeline was indeed laid according to permit requirements, and that it was covered by the requisite ten feet of cover at the point where the dredge struck it. Even if this Court were to assume that the pipeline was mislaid as Bean contends, the evidence clearly establishes that Bean did not follow the requirements for dredging over and around Texaco's pipeline, and that Bean's course of conduct would have resulted in an allision with the pipeline regardless of the pipeline's exact location.

Bean has not met its burden of overcoming this presumption of its fault. This Court also notes, as previously stated, that Bean was negligent and breached its duty to Texaco. This Court therefore concludes that Bean is liable to Texaco for the costs of repairing the pipeline and the value of the natural gas lost due to the rupture.[3]

Though punitive damages are available under general maritime law, they are not warranted in this instance. Bean's conduct was certainly eggregious; however, there is no evidence to suggest that Bean acted willfully or wantonly. See discussion of punitive damages under this Court's discussion of CONSOLIDATED's CLAIM AGAINST BEAN.

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[3]The issue of quantum has been reserved for resolutation at a later date. 639 F.Supp.—27

CONSOLIDATED'S CLAIM AGAINST TEXACO

Consolidated also makes a claim against Texaco alleging that Texaco did not act in a reasonable and prudent manner in protecting Consolidated form the possibility of a break in the pipeline because it failed to install a bypass valve on the upstream bank of the river so that the valve could be closed in the event, such as this, of a rupture of the pipeline, thus allowing the continuing flow of natural gas to Consolidated's plant.

However, the evidence presented at trial shows that Texaco was under no duty to place such a bypass valve on the upstream bank of the river. Texaco's expert witness, Mr. Johnny Atwood, a well-qualified natural gas expert, testified that all reasonable design precautions had been taken by Texaco, and that the Texaco pipeline system was designed and constructed in conformity with all applicable industry standards, government orders and sound engineering practices. And though Consolidated's own expert, Mr. Roger Craddock, testified that he was of the opinion that the pipeline was not built in accordance with sound engineering practices, he also admitted that no government regulation or industry standards code required the placement of any bypass valve different from the existing layout of the pipeline. Mr. Atwood also testified that the purpose of the subsequent addition of a valve during the repair of the ruptured pipeline was merely a precaution taken in the event the ends of the ruptured pipeline pulled away from the clamps used to repair the rupture, and that such a subsequent addition did not imply that a valve should have been installed prior to the accident.

There is also no evidence to indicate that Texaco breached any other duty owed to Consolidated. Indeed,

Texaco did not have a duty to guard Consolidated against the unexpected negligence of a third party (Bean). This Court finds that Texaco acted in a reasonable and prudent manner in all respects, and is accordingly not liable to Consolidated in any manner.

CONCLUSION

For the foregoing reasons, judgment is entered in favor of Texaco and against Bean for the costs of repairing its pipeline and the amount of gas lost due to the rupture.

All other claims involved are here DISMISSED.

Bean is hereby ORDERED to prepare a judgment in accordance with this opinion, subject to federal Rule of Civil Procedure 54(b).

APPENDIX C

CONSOLIDATED ALUMINUM CORPORATION,
Plaintiff-Appellant,
v.
C.F. BEAN CORPORATION, et al.,
Defendants-Appellees.
No. 84-4195.

United States Court of Appeals,

FIFTH CIRCUIT.

Oct. 7, 1985.

Opinion on Rehearing and Rehearing En Banc
Dec. 6, 1985.

Appeal from the United States District Court for the Western District of Louisiana.

Before JOHNSON, JOLLY, and HILL, Circuit Judges.

JOHNSON, Circuit Judge:

Consolidated Aluminum Corporation (Consolidated) sues C.F. Bean Corporation (Bean) for physical damages and economic losses that occurred shortly after a dredge owned and operated by Bean ruptured a Texaco natural gas pipeline. The Texaco pipeline supplied Consolidated's aluminum processing plant with natural gas. The resulting interruption in the supply of gas to Consolidated's plant caused extensive damage to the physical equipment at the plant that Consolidated employed for processing aluminum.

The district court granted Bean's motion for summary judgment on Consolidated's claim of negligence for damages to the plant's equipment.[1] The district court held that, under *Robins Dry Dock & Repair Co., v. Flint,* 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), no cause of action exists in tort for negligent interference with contract, even where a plaintiff has sustained physical damages arising out of the interference with contract. This Court has interpreted *Robins Dry Dock* to hold that recovery is barred to a plaintiff who asserts a claim for economic loss unaccompanied by physical damage to property in which the plaintiff has a proprietary interest. *Louisiana ex rel. Guste v. M/V TESTBANK,* 752 F.2d 1019 (5th Cir.) (en banc), *petition for cert. filed,* 53 U.S.L.W. 3839 (May 28, 1985). After careful consideration of the stipulated facts of this appeal and this Court's interpretation of *Robins Dry Dock* in *TESTBANK,* we hold that the "bright line" rule of *Robins* and *TESTBANK* does not reach the instant case and that a plaintiff's claim of negligence for physical damages to equipment in which the plaintiff has a proprietary interest should be analyzed under tort principles applied by this Court in admiralty.[2] Accordingly, the summary judgment in favor of Bean on Consolidated's negligence claim is reversed and the case is remanded.

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[1]The district court entered a final judgment under Fed.R.Civ.P. 54 and stayed all further proceedings in the case pending appeal to this Court. Record at 3.259-60.

[2]The limited nature of this appeal deserves special emphasis. As noted in more detail later in this opinion, *see infra* at 1220-1221, the district court explicitly declared that it was resting its opinion on a theory of negligent interference with contract and that no findings were made as to whether Consolidated's claim of negligence would withstand scrutiny under a foreseeability test. Accordingly, those questions are not reached on this appeal.

I. Facts and Procedural History

A. *Stipulated Facts on this Appeal*

For the district court's use in ruling upon Bean's motion for summary judgment, Bean, its insurers,[3] and Consolidated entered into a stipulation of facts. These stipulated facts will be summarized here.

Consolidated owned and operated an aluminum reduction plant near Lake Charles, Louisiana. This plant contained the following facilities:

> a. An electrically operated aluminum reduction pot line containing 71 operating smelting pots wherein alumina and bath materials are heated and melted in an electrolytic process by which molten aluminum is produced. Each pot utilizes 24 carbon anodes weighing in excess of 1000 pounds each which are suspended above the pots and project downward into the molten bath. The bottom of each pot consists of cathode blocks on which the aluminum is produced.
>
> b. A gas fired coke calciner approximately 180 feet in length which is lined with refractory brick and refractory material. In this calciner green coke is subject to temperatures, which in portions of the calciner exceed 2500 degrees Fahrenheit, and the green coke is thereby refined into calcined coke.
>
> c. A power plant which utilizes natural gas to produce electric energy for plant operations. The power plant

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[3]Consolidated sued both C.F. Bean Corporation, Bean Dredging Corporation, and their insurers. The stipulation of the parties recognized that C.F. Bean Corporation and Bean Dredging Corporation should be collectively referred to as "Bean" for the purposes of considering the motion for summary judgment and the appeal from the district court's ruling thereon. Record at 3.39. Following the parties' stipulation, we also refer to both companies and their insurers as "Bean."

> consists of three gas fired jet turbines, three steam boilers and two steam turbines, as well as associated electric generators.

Record at 3.39-40. To supply the power plant with gas necessary for the power plant's operation, Consolidated had entered into a Gas Sale and Purchase Agreement with Texaco. Other than Consolidated's contractual interest, Consolidated had no ownership interest in the Texaco pipeline. Bean had no knowledge of this contract between Consolidated and Texaco prior to the accident in question.

On April 5, 1980, Bean was conducting maintenance dredging operations in the Calcasieu River Ship Channel under a contract with the United States Army Corps of Engineers. This contract between Bean and the Corps of Engineers specifically warned Bean of the presence and location of the Texaco pipeline:

> 1-10. WORKING IN THE VICINITY OF STRUCTURES AND UTILITY CROSSINGS
>
> 1-10.1 The Contractor [Bean] shall exercise caution when working in the vicinity of structures and utilities crossing or adjacent to the channel . . . .
>
> * * *
>
> 1-10.3 The following structures or utilities are located within the limits of the work. . . . . It will be the responsibility of the Contractor to verify these locations and clearances.

Utility or Structure	*Owner*	*Station*	*Elevation*	*Address of Owner*
12' gas pipeline	Texaco, Inc.	1683 +90	-50.0 MLG	P.O. Box 60252, N.O., La. 70160

Record at 3.232-33.[4]

During the performance of Bean's work, the cutterhead of one of the dredges owned and operated by Bean struck and ruptured the Texaco pipeline. Within minutes, the rupture of the Texaco pipeline caused a reduction in gas pressure and supply to Consolidated's power plant, located approximately six miles from the pipeline rupture in the Calcasieu River.[5] As a result of this loss of supply, the amount of natural gas flowing to Consolidated's plant fell below the minimum required to operate Consolidated's plant powerhouse. Because of the reduction in gas pressure and supply, Consolidated sustained heavy physical damages:

a. Freezing (solidifying) of the liquid bath materials and liquid aluminum in the reduction pots;

b. Cracking and air burning of anodes in the reduction pots;

c. Cracking of cathode blocks in the reduction pots;

d. Air burning of sidewall blocks in the reduction pots;

e. Burning of breaker bars in the reduction pots;

f. Loss of useful life of the reduction pots; and

g. Loss and cracking of calciner refractory materials.

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[4]As noted above, however, Bean did not specifically know that the Texaco pipeline served Consolidated's plant.

[5]The parties dispute in their briefs whether the harm to Consolidated's plant occurred immediately or whether the harm occurred only after Texaco shut down a main gas line to repair the rupture. Given the procedural posture of the instant case, this Court has not attempted to resolve this factual dispute and has assumed, for purposes of this appeal, that the rupture caused a reduction in gas supply "within minutes."

Record at 3.42-43. Indeed, the resulting physical damage was so heavy that the parties stipulated the physical damages to Consolidated's plant at a value of $2.3 million. Consolidated contends that it suffered total physical and economic damages amounting to approximately $4.6 million. Full natural gas supply was not restored to Consolidated until ten days later on April 15, 1980.

B. *Procedural History*

Consolidated filed its complaint against C.F. Bean Corporation, Bean Dredging Corporation, their insurers, and Texaco to claim damages for physical and economic losses resulting from the interruption of gas services at Consolidated's plant. Consolidated's complaint alleged three grounds of recovery: (1) an action against Bean and Texaco on grounds of negligent or intentional acts or omissions leading to the injury; (2) an action against Bean on the grounds that Consolidated could recover as a third-party beneficiary under the Bean-Army Corps of Engineers contract; and (3) an action in contract against Texaco based on the Texaco-Consolidated Gas Sale and Purchase Agreement.[6] Texaco, in turn, impleaded the United States through the Department of the Army and its Corps of Engineers, claiming that the United States was also responsible for the negligent dredging which caused the rupture of the Texaco natural gas pipeline. Jurisdiction was based on the Admiralty Extension Act, 46 U.S.C. § 740, and on diversity, 28 U.S.C. § 1332.

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[6]As noted above, *see supra* at 1218 n. 1, all further proceedings in the district court were stayed pending appeal on the district court's granting of summary judgment in favor of Bean on Consolidated's tort action against Bean. Any questions arising from Consolidated's other alleged causes of action are not presented to this Court on this appeal.

At the time set for trial, the United States raised the issue of *Robins Dry Dock* concerning the claims by Consolidated, through Texaco, against the United States. After consideration of the issue, the district court then permitted Bean to reopen a prior summary judgment motion by Bean based on the same grounds. As noted above, Consolidated and Bean entered into a stipulation of facts for the district court's use in considering Bean's renewed motion for summary judgment.[7]

In its opinion, the district court held that Consolidated's action for negligent dredging against Bean was barred by *Robins Dry Dock* and its progeny in this Court. The district court's opinion, however, also contained statements which could be construed as stating that the district court also held that Consolidated was an unforeseeable plaintiff when its cause of action was considered in light of common law tort principles. *See* Record at 3.247 ("Consolidated's extensive physical and economic damages were too remote and not foreseeable as a result of Bean's negligence"). Concerned about a possible ambiguity in the district court's opinion, Consolidated filed a motion urging the district court to clarify its holding so that the matter would be more clearly presented to this Court on appeal.[8] Consolidated's motion noted, "Had the issue of foreseeability been before the [District] Court, Consolidated

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[7]The stipulation also noted that Texaco had invoked as a defense the force majeure provision in Consolidated's action in contract against Texaco based on the Consolidated-Texaco Gas Sale and Purchase Agreement.

[8]We commend the practice of the parties in stipulating the facts clearly and in clearing up any possible ambiguity in the district court's opinion. Although the district court's holding, when read as a whole, is remarkably precise, the action by Consolidated relieved this Court of any doubt in the matter. The parties are also commended for their thorough presentation of the issue presented.

would have presented a substantial volume of evidence showing that harm to customers served by the pipeline was a foreseeable consequence of the pipeline rupture." Record at 3.251. The motion in subparagraphs 3(b)-(e) then pointed out several issues of fact which bore on the question of foreseeability and which had been referred to in the district court's opinion but which were not contained in the stipulation of facts. In response to Consolidated's motion, the district court supplemented its original opinion:

> The Court has granted summary judgment in favor of Bean and against Consolidated on Consolidated's cause of action for negligence against Bean, on the basis of the Court's holding, as a matter of law, that no cause of action exists for negligent interference with contract, even where the plaintiff has sustained physical damages arising out of the interference with contract. The Court has made no findings of fact with respect to the issue of foreseeability or the other issues listed in paragraph 3(b)-(e) of Consolidated's motion.

Record at 3.257-58.

II. The Merits

The district court granted summary judgment in Bean's favor on Consolidated's claim of Bean's negligence in its dredging operations. Summary judgment is appropriate only if the full record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R. Civ.P 56(c). In considering whether to grant a motion for summary judgment, the district court must view the evidence in the light most favorable to the party resisting the

motion. The standard of review on appeal is the same. *Simon v. United States,* 711 F.2d 740 (5th Cir.1983).

Since Consolidated's contractual right to receive natural gas from Texaco was interrupted by Bean's negligent rupture of the Texaco pipeline, the district court characterized Consolidated's action against Bean for negligence as an action for negligent interference with contract. Record at 3.240, 3.244. While Consolidated recognizes that purely economic losses flowing from negligent interference with contract are not recoverable as a matter of law, *see, e.g., TESTBANK,* Consolidated argues that the presence of physical damages to property in which Consolidated has a proprietary interest (i.e., physical damages to its own plant) requires that this case be considered under tort principles of foreseeability. Consolidated asserts that it will present evidence on foreseeability if Consolidated is allowed to proceed to trial. Record at 3.251. Bean, on the other hand, argues that the distinction of physical damages in the instant case is of no significance and that this case is governed by cases in this Court holding that no cause of action exists for economic damages resulting from negligent interference with a contractual right.

In arguing that the district court's summary judgment should be sustained, Bean relies heavily on *Robins.* In *Robins,* a ship had been delivered to the defendant for repairs. Under the terms of a contract between the ship's owner and the time charterers, the time charterers were not obliged to pay rent while the ship was being repaired. The defendant, who had contracted with the owner of the ship for the repair work, negligently damaged the ship's propeller. During the additional delay caused by repairs to the propeller, the time charterers lost expected profits from the use of the ship. The time charterers sued the defendant for

these economic losses. The Supreme Court rejected the claim. The only item physically damaged was the propeller, and "[t]he injury to the propeller was no wrong to the [time charterers] but only to those to whom it belonged." *Robins*, 275 U.S. at 308, 48 S.Ct. at 135. The Court went on to note that the time charterers had lost only the benefit of their contract for hire and that "a tort to the person or property of one man does not make the tort-feasor liable to another merely beacuse the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far." *Id.* at 308-09, 48 S.Ct. at 135 (citations omitted).

Taken by itself, *Robins*, however, is of somewhat limited applicability in that it holds "only that if a defendant's negligence injures party *A*, and the plaintiff suffers loss of expected income or profits because it had a contract with *A*, then the plaintiff has no cause of action based on the defendant's negligence." *TESTBANK*, 752 F.2d at 1040 (Wisdom, J., dissenting). In the instant case, the plaintiff Consolidated sues not solely for any lost income or other *economic* loss from the interruption of its supply of natural gas (e.g., due to being forced to pay higher prices for an alternative supply) but instead for *physical* losses, as well as attendant economic damages, to its own property which occurred as a result of the interruption of Consolidated's supply of gas "within minutes" of the pipeline's rupture. Thus, unlike the time charterers in *Robins*, Consolidated's suit centers on the physical damages it sustained resulting from the incident.

Thus, if a rule based on *Robins* which bars Consolidated's claim per se is to be found, it must lie in the interpretation that this Court and other jurists have given to *Robins*. Recently, this Court, sitting en banc, conducted

an exhaustive study of *Robins* and its progeny. In *TESTBANK*, this Court reviewed a summary judgment entered against a host of plaintiffs who claimed purely economic losses arising out of a spill of a toxic chemical in the Mississippi River Gulf outlet. Reviewing this Court's interpretation of *Robins*[9] and the cases cited by Justice Holmes in his opinion in *Robins*, the Court determined that *Robins* is not based on whether a plaintiff's harm is "foreseeable" or "remote" in a factual sense but instead on "the character of the interest harmed" for which a plaintiff seeks relief. *TESTBANK*, 752 F.2d at 1022-24 (quoting *Dick Meyers Towing Service, Inc. v. United States*, 577 F.2d 1023, 1025 (5th Cir.1978), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979)). The "character of the interest harmed" for which the plaintiffs sought relief in *TESTBANK* was solely economic. *Id.* at 1021. Given this character of the interest harmed, the Court reaffirmed the holding of this Court that "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unitentional maritime tort." *Id.* at 1020. The Court emphasized that to abandon the physical injury requirement would impose a "limitless type of liability," *id.* at 1025 (quoting *General Foods Corp. v. United States*, 448 F.Supp. 11 (D.Md.1978)), and the result would be "wave upon wave of successive economic consequences." *Id.* at 1028. The Court also noted the corresponding difficulty to courts in managing such economic

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[9]Perhaps most notably, the *TESTBANK* Court observed that in *Kaiser Aluminum & Chemical Corp. v. Marshland Dredging Co.*, 455 F.2d 957 (5th Cir.1972)(per curiam), the plaintiff lost gas supplies when the defendant dredging company broke a gas pipeline owned by Sugar Bowl Gas Company. Kaiser sought only economic losses for shutdown expenses and production losses. The Court held that because such economic losses were only negligently inflicted, recovery was precluded as a matter of law.

claims on a discrete basis under traditional tort principles. *Id.* at 1028. Thus, where the character of the interest harmed was solely economic, the Court held that no recovery could be allowed under *Robins* as a "pragmatic limitation upon the tort doctrine of foreseeability." *Id.* at 1023.

In the instant case, this "pragmatic limitation upon the tort doctrine of foreseeability" does not apply. Rather, Consolidated plainly suffered physical harm to property in which it has a proprietary interest—i.e., its own equipment for deriving aluminum. Thus, *TESTBANK* does not apply. *See Domar Ocean Transportation, Ltd. v. M/V ANDREW MARTIN,* 754 F2.d 616 (5th Cir.1985)("maritime tort damages for economic loss can be awarded only when the plaintiff has suffered physical damage to a proprietary interest"). Further, Beans's characterization of the physical harm in this case as a "negligent interference with contract" tends to obscure more than to illuminate. Unlike the claimant in *Robins,* Consolidated does not seek recovery solely for the loss of a contractual expentancy. While Bean's alleged negligence certainly interfered with Consolidated's contractual arrangement with Texaco, it cannot be gainsaid that, under the stipulated facts on this appeal, Bean's negligence also led to Consolidated's physical damages. While the presence of the Consolidated-Texaco contract *is relevant* to the question of foreseeability, its presence in the causal chain does not bar recovery.[10]

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[10]Indeed, the Court in *TESTBANK* noted that a contractual relationship can make the plaintiff's harm *more* foreseeable. In discussing *Byrd v. English,* 117 Ga. 191, 192, 43 S.E. 419 (1903), a case involving a printer's recovery for lost profits resulting from the defendant's negligent interruption of the plaintiff's electrical power, the Court stated,

> That the printing company had a contract with the power company did not make more remote the relationship between its loss of

(Continued on next page)

The Court's result in the instant case is consistent with the opinions of other courts and commentators. In accord with this Court's rule in *TESTBANK*, the Restatment (Second) of Torts, for example, notes that there has been no general recognition of liability for a negligent interference with contract absent physical injury to a plaintiff's proprietary interest.[11] The authors explain that courts generally have been reluctant to allow claims for such economic losses because of the difficulty in limiting a defendant's liability. Restatement (Second) of Torts § 766C, Comment a. Where plaintiffs have suffered physical harm to their own property, however, these authorities recognize that the rationale for applying the rule foreclosing relief for

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(Continued)

> profits and the tortious acts. To the contrary, the contract reduced this remoteness by defining an orbit of predictable injury smaller than if there were no contract between the power company and the printer. When the loss is economic rather than physical, that the loss caused a breach of contract or denied an expectancy is of no moment.

752 F.2d at 1023-24

[11]Section 766C states:

Negligent Interference with Contract or Prospective Contractual Relation.

One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently

(a) causing a third person not to perform a contract with the other, or

(b) interfering with the other's performance of his contract or making the performance more expensive or burdensome, or

(c) interfering with the other's acquiring a contractual relation with a third person.

Restatement (Second) of Torts § 766C.

economic harm does not apply. While the number of plaintiffs suffering only economic harm from a negligent act is indeterminate and perhaps infinite, the number of potential plaintiffs suffering physical harm is generally neither as indeterminate nor as possibly infinite. *See* Comment, *Foreseeability of Third-Party Economic Injuries—A Problem in Analysis,* 20 U.Chi.L.Rev. 283, 298 (1953); Pearlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine,* 49 U.Chi.L.Rev. 61, 71-72 (1982). Thus, commentators have stated that a plaintiff is not barred from recovery where the plaintiff has suffered physical harm to his own person or property. The Restatement authors explain:

> **b. Physical harm to the other.** The rule stated in this Section [766C] applies when the plaintiff suffers only pecuniary loss, such as the loss of the financial benefits of a contract or of prospective trade or financial loss through being put to additional expense. If there is physical harm to the person or land or chattels of the plaintiff, the rule stated in this Section does not apply and there may be recovery for negligence that results in physical harm because of the nonperformance of a contract with the plaintiff. This recovery is of course subject to the usual rules governing liability for negligence.

Restatement (Second) of Torts § 766C, Comment b (citations omitted).[12] Likewise, Professors Prosser and Keeton

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[12]The distinction that this Court has drawn (as exhibited in *TESTBANK*) between physical and economic damages has also been drawn by other courts. *See, e.g., Barber Lines A/S v. M/V Donau Maru,* 764 F.2d 50 (1st Cir.1985). Likewise, state courts have made a similar distinction. In *Stop & Shop Cos. v. Fisher,* 387 Mass. 889, 444 N.E.2d 368 (1983), the plaintiff sought damages for loss of business revenues

(Continued on next page)

distinguish instances in which a plaintiff recovers for physical damages from the rule denying relief for economic losses resulting from negligent interference with contract. W. Prosser & W. Keeton, *Prosser and Keeton on the Law of Torts*, § 129, at 1000 n. 27 (Lawyers' ed. 1984).

(Continued)
allegedly caused by the defendant's negligent collision with a drawbridge. Although the plaintiff had no proprietary interest in the drawbridge, the plaintiff alleged that it suffered economic losses due to the loss of potential customers who could not cross the drawbridge and reach the plaintiff's store. The court distinguished an earlier Massachusetts case, *Newlin v. New England Telephone & Telegraph Co.*, 316 Mass. 234, 54 N.E.2d 929 (1944), on the basis that *Newlin* involved physical harm to the plaintiff's own property caused by the interruption of plaintiff's supply of electricity from the power company. On an appeal from the trial court's sustaining of a demurrer, the court in *Newlin* allowed recovery for the loss of plaintiff's mushrooms which resulted when the defendant's telephone pole fell and severed an electrical power line supplying plaintiff's electrical apparatus for controlling temperature. Similarly, courts generally have recognized, albeit in dicta, that a distinction exists between cases in which a plaintiff sustains physical damages and those in which only economic damages are claimed. *See, e.g., Akron Corp. v. M/T CANTIGNY*, 706 F.2d 151, 153 (5th Cir.1983) (per curiam); *Louisville & N. R.R. v. M/V VAYOU LACOMBE*, 597 F.2d 469, 473-74 (5th Cir.1979); *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984).

Moreover, to the extent that Louisiana law is relevant to the instant case, it is consistent with this writing. In *PPG Industries, Inc. v. Bean Dredging Corp.*, 447 So.2d 1058 (La.1984), the court was confronted with PPG's claims for economic losses only arising out of the same dredging accident as that which occurred in the instant case. The court did not apply a rule of per se exclusion, as that contained in *Robins*, but instead held that PPG's claim for economic losses was not recoverable under a duty risk analysis. The court emphasized that its holding turned largely on the economic character of PPG's loss. 447 So.2d at 1061.

III. Conclusion

We therefore conclude that the district court erred in granting summary judgment in favor of Bean. The "pragmatic limitation upon the tort doctrine of foreseeability," derived from *Robins* and *TESTBANK*, does not apply to the instant case. While defendant Bean urges this Court to determine "[u]nder a traditional tort analysis [that] Consolidated's harm [is] . . . too remote," Bean's Brief at 12, we leave the determination of the foreseeability of Consolidated's injury for the trial court to determine on remand. Likewise, application of other tort law principles applied in admiralty are left for the trial court on remand as questions calling for the determination of such principles are not presented on this appeal.

REVERSED AND REMANDED

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

The petition for panel rehearing is DENIED. In view of the petition's suggestion that the panel opinion inadvertently creates "a brand new theory of recovery for negligent interference with a contract where physical damage occurs solely from the loss of anticipated contract benefits," we take this opportunity to reemphasize the limited nature of the appeal and the narrowness of our holding.

Our discussion of the Robins Dry Dock/TESTBANK line of cases showed that the "pragmatic limitation upon the tort doctrine of foreseeability," State of Louisiana, ex rel. Guste v. m/v TESTBANK, 752 F.2d 1019, at 1023 (5th Cir.1985), established by these cases, is inapplicable to the

instant case because the plaintiff Consolidated unquestionably suffered physical harm to its own property. We further conclude that the mere existence of a contract between Texaco (whose property suffered the most immediate harm from the defendant's dredging) and Consolidated does not create a legal bar to Consolidated's claim against Bean for negligent dredging. We in no way intimated that Consolidated could recover for "negligent jinterference with contract." Nor did we hold that summary judgment for the defendant would necessarily be improper on the facts of the instant case. Rather, we remanded because the district court expressly omitted to review the issue of foreseeability with regard to negligent dredging. We expressly declined to reach the question of "whether Consolidated's claim of negligence would withstand scrutiny under a foreseeability tes," 772 F.2d at 1218 n. 2, and left the application of traditional tort principles, including foreseeability and the related concept of legal duty, for the trial court to determine on remand, at 1224.

Thus, the petition for rehearing is DENIED, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

APPENDIX D

IN THE

United States District Court

FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

CONSOLIDATED ALUMINUM CORP. — VS. C. F. BEAN CORPORATION, et al	**CIVIL ACTION NO. 81-0500**

February 8, 1984

EARL E. VERON
UNITED STATES DISTRICT JUDGE

RULING ON DEFENDANT, C. F. BEAN'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Consolidated Aluminum Corporation (hereinafter "Consolidated"), the owner of an aluminum production plant, had a contract with defendant/third-party plaintiff Texaco, Inc., for the delivery of natural gas. On April 5, 1980, the delivery of those services was allegedly negligently interfered with when Texaco's submerged pipeline was ruptured by the cutterhead of Dredge 32, owned by Bean Dredging Corporation (hereinafter "Bean"), which was performing ship channel maintenance dredging pursuant to a contract with the United States Army Corps of Engineers. Consolidated filed a complaint against both

Bean and Texaco, and Texaco filed a third-party complaint against the United States.

Consolidated seeks recovery for Bean's alleged negligent dredging which ruptured Texaco's gas pipeline thereby causing physical damage to Consolidated's plant with resulting economic losses. Bean brings the instant motion arguing that, as a matter of law, Consolidated cannot recover physical or economic losses for negligent interference with the Texaco-Consolidated gas contract. Although no case has so held, Consolidated argues that once physical damage is suffered from negligent interference with a contract, that resulting economic damages are also recoverable.

After analyzing the pleadings, the applicable caselaw and hearing extensive oral argument, the court now holds that Consolidated was an unforeseeable plaintiff as to Bean's alleged negligent interference with the pipeline contract, and thus that Consolidated's damages were too remote and unforeseeable to justify recovery.

THE ROBINS DRY DOCK RULE AND BASIC TORT PRINCIPLES

In *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), a time charterer sued a ship repairer to recover for loss of use arising from the repairer's negligence and resulting delays in the vessel's release. The court ultimately held:

> The injury to the propeller was no wrong to the respondents [Flint, et al] but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may

> give rise to a cause of action . . . no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. . . .

275 U.S. at 308-309 (citations omitted). The "Robins Dry Dock Rule" basically holds that a tort feasor is not liable for economic damages to third parties merely because the tort feasor's original "victim" had a contract with such third parties.

Many courts have adhered to *Robins Dry Dock*, in admiralty and in other areas. *See, e.g. Louisville & N.R. Co. v. M/V Bayou LaCombe*, 597 F.2d 469 (5th Cir. 1979); *Kaiser Aluminum & Chemical Corp. v. Marshland Dredging Co.*, 455 F.2d 957 (5th Cir. 1971) and *Forcum-James Co., Inc. v. Duke Transportation Co.*, 231 La. 953, 93 So.2d 228 (1957). The rule has also garnered criticism. *See Federal Commerce & Navigation Co., Ltd., v. M/V Marathonian*, 392 F.Supp. 908 (S.D.N.Y. 1975), aff'd. 528 F.2d 907 (2nd Cir. 1975), *cert. denied*, 425 U.S. 975 (1976) and *PPG Industries, Inc. v. Bean Dredging Corp.* 419 So.2d 23 (La. App. 3rd Cir. 1982), *writ.* granted, So.2d , (La. 1984) (A companion to the instant case).

Plaintiff Consolidated argues that the Restatement (2d) of Torts adopts the *Robins Dry Dock* rule in § 766 c, but that this proviso exists at comment b to that section:

> If there is physical harm to the person or land or chattels of the plaintiff, the rule stated in this Section does not apply and there may be recovery for negligence that results in physical harm because of the nonperformance of a contract with the plaintiff. . . . When recovery is allowed, the loss of expected profits or

> other pecuniary loss may, in an appropriate case, be recovered as "parasitic" compensatory damages.

Comment b then contains an illustration based on *Newlin v. New England Telephone & Telegraph Co.*, 316 Mass. 234, 54 N.E. 2d 929 (1944), wherein defendant's negligence broke a power line supplying plaintiff's mushroom cellars, resulting in frozen and lost crops. The Massachusetts court allowed the grower to recover for his physical damages (lost crops) as a result of electricity interruption. Bean distinguishes *Newlin* by pointing out that the case never discusses or even cites *Robins Dry Dock*. Bean also correctly observes that *Newlin* only involves the issue of whether the defendant—pole owners owed a duty to protect the plaintiff's mushroom plant, considering that the errant pole was but "a short distance from the plant." 54 N.E. at 940.

In any event, *Kaiser Aluminum & Chemical Corp. v. Marshland Dredging Co.*, 455 F.2d 957 (5th Cir. 1971) presents a strikingly analogous situation to that of the case at bar. There, defendant's dredge negligently dropped an anchor which punctured a gas pipeline owned and operated by Sugar Bowl Gas Company. The accident caused interruption of gas service to Kaiser's production plant and resulting expenses and production losses. Kaiser had a contract with Sugar Bowl Gas for gas service. The trial judge granted defendant-dredger's motion for summary judgment based on *Robins Dry Dock*. The Fifth Circuit affirmed, agreeing that Kaiser's recovery was precluded, as a matter of law. Consolidated would distinguish this case arguing that it suffered "physical" damages in addition to economic losses.

In fact, as a supplement to the motion for summary judgment, the parties stipulated that Consolidated experienced $2.3 million worth of physical damages (due to the

freeze up of aluminum pots and the processes stoppage) because of gas-line interruption. (*See* Attachment 1.)

Regardless of any physical damages Consolidated suffered, caselaw clearly holds that a tort-feasor is not liable for such indirect damages, as in this situation, unless his actions were intentional and not merely negligent. *See* generally *Morse v. Piedmont Hotel Co.*, 110 6a. App. 509, 139 S.E. 2d 133 (1964); *Byrd v. English*, 117 6a. 191, 43 S.E. 419 (1903); *Hercules Carriers, Inc. v. State of Florida, et al.*, 720 F.2d 1201 (11th Cir. 1983) and Restatement (2d) of Torts, § 766. Basically, Consolidated's only damages concerned its interests in maintaining gas delivery. Their interest arose only from its contract with Texaco. Bean, furthermore, owed no duty to Consolidated to deliver the gas and lacking express knowledge, Bean owed Consolidated no duty of refraining from interfering with Consolidated's gas delivery interests. Consolidated had no property rights in Texaco's pipeline, which was the only interest *directly* damaged by Bean's negligence. *Morse v. Piedmont Hotel, supra*, for example, would hold that Bean has no duty to protect Consolidated's interest in its gas contract with Texaco. Plaintiff can cite no cases to the contrary.

Consolidated's physical damages, no matter how great, were indirect. Consolidated suffered no direct physical harm or diminution in its property values. Fifth Circuit law does not recognize claims based solely on harm to contractual or business expectations with another. *See Cargill, Inc. v. Offshore Logistics, supra*, 1615 F.2d 212 (5th Cir. 1980) and *Vicksburg Towing Co. v. Mississippi Marine Transport Co.*, 609 F.2d 176 (5th Cir. 1980).

Unquestionably, the prevailing rule (and especially in Louisiana) is that a plaintiff may not recover indirect damages arising from negligent interference with another's property. Rather, recovery for interference with property must be intentional before recovery, as direct damages, is allowed. As the Restatement of Torts points out, "... [T]hus far there has been no general recognition of any liability for negligent interference, whether it is interference with a third-person's performance of his contract with the plaintiff, or with the plaintiff's performance of his own contract." *Restatement Second of Torts,* 766 (c), comment (a).

Courts and commentators have stressed various factors in refusing to grant such damages for negligent interference with a contract: (1) the variable nature of contractual relations, (2) the fear of undue burdens on defendant's freedom of action, (3) the probable disproportion between damages recoverable and the extent of defendant's fault and (4) the defendant's inability to foresee all possible plaintiff's having contracts with the victims of their torts. Implicit in the *Robins Dry Dock* rule is a recognition that a limit must exist to a tort feasor's liability for the potential "snowball effect" of his negligence on the rest of the world. Various theories are presented in the law to allow limits to defendant's liability for damages which are a cause in fact of his negligence. Some have analyzed the problem in terms of foreseeability and duty-risk. Other theories have stressed legal duty and remoteness of injury. The common thread in all of these is that without any direct damage to the victim's person or property, recovery is denied. As noted by the Second Circuit, in the classic case where a ship wreck with a bridge interrupted river traffic:

> [S]uch limiting principles must exist in any system of jurisprudence, for cause and effect succeed one another with the same certainty that night follows day, and the consequences of the simplest act may be traced over an ever widening canvas with the passage of time. . . .
>
> On the previous appeal we stated aptly: 'somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only tortuity.' 338 F.2d at 725. We believe that this point has been reached with the *Cargill and Cargo Carriers* claims. Neither the Gillies nor the Farr[s] suffered any direct or immediate damage for which recovery is sought. The instant claims occurred only because the downed bridge made it impossible to move traffic along the river. Under all the circumstances of this case, we hold that the connection between the defendants' negligence and the claimants' damage is too tenuous and remote to permit recovery. 'The law does not spread its protection so far.' Holmes, J., in *Robins Dry Dock, supra,* 275 U.S. at 309, 48 S.Ct. at 135.

Petition of Kinsman Transit Co., 388 F.2d 821 824-825 (2d Cir. 1968).

CONCLUSIONS

Here we must reach the same conclusion as in *Petition of Kinsman Transit Co.*, supra., Consolidated's extensive physical and economic damages were too remote and not foreseeable as a result of Bean's negligence. Bean's negligence operated only as to Texaco and affected Consolidated only as a result of Texaco's contract with Consolidated. We can not depart from the *Robins Dry Dock* rule in this case. The rule, afterall, works well in the commercial

world. For example, a third-party in Consolidated's situation can obtain appropriate property or business interruption insurance and can employ emergency back-up power sources for its fragile aluminuzation processes. Third-parties can also protect themselves through contract provisions with suppliers.

If this court were writing on a clean slate, we might depart from established tort principles and sympathetically allow Consolidated some recovery here. However, it seems that Consolidated suffered physical damages from the gas-interruption solely because of the fragileness of the aluminum-making process. Alternatively, other industries suffering power interruption are not as adversely affected. Perhaps Consolidated's "physical damages argument" against the *Robins Dry Dock* rule is merely "a distinction without a difference" as plaintiff argues.

For the foregoing reasons, judgment is granted in favor of Bean, rejecting Consolidated's claims against them. The court deeems that a F.R.Civ.P. 54(b) judgment is appropriate at this time. Bean's counsel is to prepare this judgment and submit it to the court within 10 days, with copies mailed to all parties in the action.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 8th day of February, 1984.

/s/ EARL E. VERON

Earl E. Veron
United States District Judge

APPENDIX E

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-4657

D.C. Docket No. CI-81-0500-LC

CONSOLIDATED ALUMINUM CORPORATION,
Plaintiff-Appellant,

versus

C.F. BEAN CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

Before THORNBERRY, REAVLEY, and POLITZ,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

December 3, 1987

ISSUED AS MANDATE: JAN 15, 1988

APPENDIX F

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-4657

CONSOLIDATED ALUMINUM CORPORATION,
Plaintiff-Appellant,

versus

C.F. BEAN CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion December 3, 5 Cir., 1987, F.2d)
(January 5, 1988)

Before THORNBERRY, REAVLEY and POLITZ,
Circuit Judges.

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this

Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge